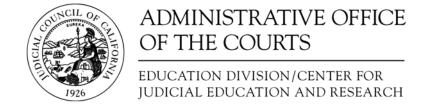
## CALIFORNIA JUDGES BENCHGUIDES

## **Benchguide 83**

## **RESTITUTION**

[REVISED 2005]



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### I. [§83.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of the law and procedure relating to restitution fines, fees, and orders in adult, juvenile, and diversion matters. Sections 83.2–83.3 contain procedural checklists. Sections 83.4–83.81 summarize the applicable law. Sections 83.82–83.89 contain forms. Section 83.90 contains a victim restitution flowchart. Sections 83.91–83.92 provide information about California's program to compensate victims of crime for unreimbursed losses and the California Department of Correction's (CDC) restitution collection program.

### II. PROCEDURAL CHECKLISTS

### A. [§83.2] Restitution Fines

(1) Before accepting a plea of guilty or no contest:

- (a) Advise defendant that the sentence will include a restitution fine of \$200 to \$10,000 for a felony conviction, and \$100 to \$1000 for a misdemeanor conviction, in addition to any other fine the court may impose. For discussion, see §83.11.
  - ► JUDICIAL TIPS: The admonition may be, and often is, part of a written form. Defendant should be advised of the range of the fine and not merely the possible maximum. The admonition should also cover the probation revocation and parole revocation restitution fines. For discussion, see §83.11; for script and form, see §83.82–83.83.
    - (b) Determine whether the disposition is part of a plea bargain.
    - If so, ascertain on the record whether the bargain limits the court's discretion with respect to the restitution fine.
  - ► JUDICIAL TIP: Proposed dispositions that purport to waive the fine or set it below the statutory minimum should be rejected. Pen C §1202.4(b); see §83.5.
    - (2) Before sentencing:
- (a) Preliminarily determine the amount of the restitution fine by considering
  - Any limitation imposed by a negotiated plea. Illustrations: fine to be in amount of statutory minimum; "wobbler" to be sentenced as misdemeanor.
  - ► JUDICIAL TIP: In the aftermath of a plea bargain that failed to address the restitution fine, the court should either impose the minimum fine or give defendant an opportunity to withdraw the plea. For discussion, see §83.12.
    - The statutory range:

	Minimum	Maximum
Misdemeanor	\$100	\$1000
Felony	\$200	\$10,000

For juvenile offenders, see §83.9.

- Seriousness and circumstances of the offense. Pen C \$1202.4(b)(1), (d).
- *Inability to pay.* Pen C §1202.4(d).
- → JUDICIAL TIPS: (1) Defendant has the burden of showing inability to pay. Pen C §1202.4(d). (2) Inability to pay only affects the amount of the fine above the statutory minimum. Pen C

- §1202.4(c). (3) The California Department of Corrections (CDC) collects restitution fines from the wages and trust account deposits of prisoners. See §§83.5, 83.15, 83.23.
- Defendant's economic gains, if any, from the crime; losses suffered by others; the number of victims, and any other relevant factors. Pen C §1202.4(d); for discussion, see §83.14.
- ► JUDICIAL TIP: Judges often consider the amount of restitution to victims and other fines defendant will be ordered to pay. Again, these considerations only affect the amount of the restitution fine in excess of the statutory minimum.
  - The formula set out in Pen C §1202.4(b)(2) permits, but does not require, the court to set a restitution fine in a felony case as follows: \$200 x number of years to be served x number of felony counts of which defendant was convicted.
- ► JUDICIAL TIP: Some judges simplify the formula to \$200 x number of counts. In the view of some judges, a life sentence calls for the maximum fine.
- (b) Determine whether an additional probation revocation restitution fine must be imposed and suspended under Pen C §1202.44. Such a fine is mandatory whenever a defendant receives a conditional sentence or a sentence that includes a period of probation. For discussion, see §83.6.
- (c) In a felony case determine whether an additional parole revocation restitution fine must be imposed and suspended under Pen C §1202.45. Such a fine is mandatory whenever defendant will be sentenced to state prison and will be eligible for parole. For discussion, see §83.7.
- (d) Consider whether there are compelling and extraordinary reasons not to impose a restitution fine. Pen C §1202.4(c); for discussion, see §83.20. If yes, make notes for statement of reasons and proceed to (e); if no, proceed to (f).
  - ► JUDICIAL TIPS: Inability to pay is not an adequate reason. Pen C §1202.4(c). Nor, in the view of most judges, is a prison sentence. See §§83.5, 83.15, 83.23.
- (e) Determine either (i) how much community service to require of defendant instead of the restitution fine or (ii) whether there are compelling and extraordinary reasons to waive the requirement. Pen C §1202.4(n). In the event of (ii), make notes for a second statement of reasons at sentencing.

- (f) Determine whether the offense is one for which an additional restitution fine may be imposed under Pen C §294 for specified acts of misconduct against children and for child pornography. (Note: The CDC does not have the authority to collect restitution fines under Pen C §294.) For discussion, see §83.8. If yes, proceed to (g); if no, proceed to 3.
- (g) Consider whether to impose an additional restitution fine, and if so, in what amount. See §83.8.
  - (3) At sentencing:
- (a) Consider matters raised by counsel and make final decision concerning the restitution fine.
  - ► JUDICIAL TIPS: (1) Restitution fines are normally imposed at the sentencing hearing; defendant is not entitled to a separate hearing. See §83.5. (2) A judge who is inclined to impose an additional restitution fine under Pen C §294 should so inform defendant at the outset of the sentencing hearing and give defendant an opportunity to be heard.

To impose a restitution fine proceed to (b); to waive the fine proceed to (f).

(b) *Impose a restitution fine (Pen C §1202.4)*.

### **►** JUDICIAL TIPS:

- No portion of this fine may be stayed, suspended, or offset by the amount of victim restitution defendant is ordered to pay. See §83.21.
- As long as the fine is imposed, findings are unnecessary (Pen C §1202.4(d)) and usually not made. See §83.18.
- The court should not enter a separate money judgment. Although restitution fines are enforceable in the manner of money judgments, the court may not actually enter a money judgment against a defendant for these amounts. See §83.24.
- (c) *If defendant is granted probation:*
- Make payment of the fine a condition of probation. Pen C §1202.4(m).
- Impose an additional fine in the same amount as the restitution fine and order it suspended unless probation is revoked. Pen C §1202.44. The court cannot waive or reduce this fine absent compelling and extraordinary reasons, which must be stated on the record. See §83.6.

- (d) If defendant is sentenced to prison, impose an additional fine in the same amount as the restitution fine and order it suspended unless parole is revoked. Pen C §1202.45.
  - ► JUDICIAL TIP: It is unnecessary to order this fine when defendant is ineligible for parole. See §83.7.
    - (e) Impose any additional discretionary restitution fine. Pen C §294.
    - (f) When no restitution fine is imposed:
- (i) State compelling and extraordinary reasons for this action on the record and
- (ii) Order defendant, as a condition of probation, to perform community service as specified by the court instead of the fine, or state on the record compelling and extraordinary reasons for not ordering community service. Pen C §1202.4(n).
  - ► JUDICIAL TIP: This statement should be in addition to the statement of reasons for not imposing a restitution fine. Pen C §1202.4(n).

### B. [§83.3] Victim Restitution

- (1) Before accepting a plea of guilty or no contest:
- (a) Advise defendant that the sentence may include an order to pay restitution to the victim in an amount to be determined by the court. For discussion, see §83.29; for script and form, see §§83.82–83.83.
  - ► JUDICIAL TIPS: (1) When it is clear that the court will order restitution, many judges say so at this point. (2) The admonition can be incorporated into a written form.
- (b) Advise defendant that he or she is entitled to a hearing in court to dispute the amount of restitution but not the actual order to make restitution. See §83.38.
  - ► JUDICIAL TIP: Many judges prefer to give this advice at the time of sentencing.
- (c) When there is a Harvey waiver that will give the court authority to consider dismissed counts for restitution purposes, make sure that the waiver is stated clearly on the record, that its scope is clear, and that defendant understands it. For discussion, see §83.72.
- (2) Before sentencing consider the probation report, when available, and
  - (a) Whether restitution should be ordered

- Because one or more victims suffered or will suffer an economic loss as a result of the crime(s) of which defendant was convicted (Pen C §1202.4(a)(1); for discussion, see §§83.36–83.70); or
- For other reasons (e.g., Harvey waiver; hit-run victim; see §§83.72–83.81).
- JUDICIAL TIP: Judges may order victim restitution, if appropriate, for infractions. Although restitution *fines* are expressly limited to felonies and misdemeanors, there is no such express limitation with respect to victim restitution. See Pen C §§19.7 (statutes relating to misdemeanors generally applicable to infractions), 1202.4(a)(1) (legislative intent that crime victims who suffer economic loss receive restitution), 1202.4(f) (restitution required in every case in which victim suffered economic loss as result of defendant's crime), and 1203b (courts may grant probation in infraction cases).
- (b) Whether the report includes detailed loss figures for each victim and whether they appear to be reasonable.
- (c) Whether there are compelling and extraordinary reasons not to order full restitution. Pen C §1202.4(f); for discussion, see §83.56. If yes, make notes for statement of reasons and proceed to (d); if no, proceed to (3).
  - JUDICIAL TIPS: (1) This step should be taken only when the case comes within the mandatory restitution provisions of Pen C §1202.4 or Welf & I C §730.6. Restitution to persons or for losses not covered by Pen C §1202.4 is discretionary (see §§83.72−83.81) and not governed by a compelling-and-extraordinary-reasons analysis. (2) Defendant's inability to pay does not justify ordering less than full restitution. Pen C §1202.4(g); Welf & I C §730.6(h); for discussion, see §83.42.
- (d) Either (i) how much community service to require of defendant instead of full restitution, or (ii) whether there are compelling and extraordinary reasons to waive community service. Pen C §1202.4(n). In the event of (ii), make notes for a separate statement of reasons at sentencing.
  - ► JUDICIAL TIP: This statement should be separate from the statement of reasons for not requiring full restitution. The reasons are not always identical. Thus, a prison sentence makes community service impractical, but a waiver of restitution has to rest on another ground because restitution can be collected from prison wages and trust account deposits. For discussion, see §83.23.
    - (3) At sentencing

- (a) Announce either:
- (i) The court's preliminary views on restitution and inquire whether the victim or the defendant wishes to be heard. If yes, proceed to (c); if no, proceed to (d) to order restitution or to (f) when waiving restitution.

Or

- (ii) That the probation report does not contain (sufficient) restitution information and proceed to (b).
  - (b) When the probation report lacks restitution data:
- (i) Ascertain whether the victim is present. If yes, receive the victim's loss information; permit defendant to challenge it; upon request continue to give defendant time to rebut it. If no, proceed to (ii).

Or

- (ii) When the victim is not present and the report recommends a continuance, grant a reasonable continuance as to restitution issues.
  - ► JUDICIAL TIP: Judges usually sentence the defendant even though restitution will be determined later. Jurisdiction can be reserved by including in the sentence an order for the defendant to pay restitution in an amount to be determined by the court. Judges often seek a waiver of defendant's presence at the subsequent hearing. This is particularly useful when the defendant is being sentenced to prison.

Or

- (iii) When the victim is not present, was notified, has not made a claim, and the report does not request a continuance, do not order restitution, except for any benefits that the victim received from the Restitution Fund. Some judges reserve jurisdiction to order restitution unless the prosecutor states that none is due. See §83.58
  - (c) Conduct a hearing when the victim or defendant requests one.
  - ► JUDICIAL TIP: The hearing does not have the formality of a trial. Hearsay is admissible. For discussion, see §83.40.

At the end of the hearing proceed to (d) to order restitution; otherwise proceed to (f).

(d) Order defendant to pay restitution (for discussion, see §§83.57–83.62):

*Use a separate order for each victim.* For form, see §83.84.

- Identify each loss separately by name of victim and amount; do not merely order a lump sum payment.
- Specify whether interest (at 10 percent) will accrue from the date of the order or of the loss. Pen C §1202.4(f)(3)(G).
- Specify whether codefendants are jointly and severally responsible for restitution.
- Do not delegate determination of restitution amount unless the defendant consents to a determination by the probation officer; determination of the number and dollar amounts of installment payments is often delegated to the probation department or other county agency. For discussion, see §83.59.
- When the sentence includes probation, make payment of the restitution order a condition of probation. Pen C §1202.4(m).
- Order defendant to pay restitution to the California Victim Compensation and Government Claims Board to reimburse payments to the victim from the Restitution Fund. Pen C §1202.4(f)(2).
- ► JUDICIAL TIP: The court should not enter a separate money judgment. Although restitution orders are enforceable in the manner of money judgments, the court may not actually enter a money judgment against a defendant based on an order to pay restitution. See §83.24.
- (e) Make and stay a separate income deduction order upon determining that defendant has the ability to pay restitution. Pen C §1202.42; for discussion, see §83.64. For sample income deduction order and related forms, see §§83.86–83.89.
  - ► JUDICIAL TIP: Penal Code §1202.42 does not apply to juvenile court restitution or to any restitution order not made under Pen C §1202.4. For discussion of orders to apply a specified portion of earnings to restitution, see §83.65.
- (f) When restitution is not ordered because of compelling and extraordinary reasons:
  - (i) State reasons on the record, and
- (ii) Order defendant, as a condition of probation, to perform community service as specified by the court or state on the record compelling and extraordinary reasons for not ordering such service. Pen C §1202.4(n).
  - ► JUDICIAL TIP: This statement should be in addition to the statement of reasons for not ordering the payment of restitution. See (2)(d) of this checklist.

### III. APPLICABLE LAW

#### A. Restitution Fine

### **1.** [§83.4] Purpose of Fine

Restitution fines are a major source of financing the state Restitution Fund (see Pen C §§1202.4(e), 1202.44, 1202.45); penalty assessments on other fines provide additional financing. See Pen C §1464. Eligible victims of criminal acts may obtain restitution from the Restitution Fund, which is administered by the California Victim Compensation and Government Claims Board. For detailed information about the Board's Victim Compensation Program, see §83.90.

### 2. Major Statutory Requirements

### a. [§83.5] Penal Code §1202.4

The principal statutes that govern the imposition of restitution fines on adult offenders are Pen C §§1202.4, 1202.44, and 1202.45. For discussion of Pen C §§1202.44 and 1202.45, see §83.6–83.7; for juvenile offenders, see §§83.9–83.10. Key features of Pen C §1202.4 include:

- *Mandatory nature of fine*. Imposition of the fine is mandatory except for compelling and extraordinary reasons stated on the record. See §83.20.
- Statutory minimums and maximums:

Felonies: \$200–\$10,000 Misdemeanors: \$100–\$1000

- Limited effect of inability to pay. Defendant's lack of ability to pay does not justify waiver of the fine. It may be considered only in setting the amount above the statutory minimum. For discussion, see §83.15; for discussion of other factors the court should consider in setting the fine, see §83.14.
- *Hearing*. Defendant is not entitled to a separate hearing for determining the amount of the fine. See §83.13.
- *Community service*. When the court does not impose a restitution fine, defendant must be ordered to perform community service except for compelling and extraordinary reasons stated on the record.
- *Probation*. Grants of probation must include payment of the restitution fine as a condition.

### b. [§83.6] Penal Code §1202.44

When a defendant receives a conditional sentence or a sentence that includes a period of probation, the court must impose an additional restitution fine. Pen C §1202.44. The probation revocation restitution fine has the following features (Pen C §1202.44):

- It must be imposed in addition to, not instead of, the restitution fine required by Pen C §1202.4;
- The amount of the fine is the same as the amount imposed under Pen C §1202.4;
- The fine does not become effective unless and until the probation or conditional sentence is revoked; and
- The court may not waive or reduce the fine, absent compelling and extraordinary reasons stated on the record.

### c. [§83.7] Penal Code §1202.45

When a defendant is sentenced for one or more felonies and will be statutorily eligible for parole, the court must impose an additional restitution fine. Pen C §1202.45. The parole revocation restitution fine has the following features (Pen C §1202.45):

- It must be imposed in addition to, not instead of, the restitution fine required by Pen C §1202.4.
- The amount of the fine is the same as the amount imposed under Pen C §1202.4.
- The fine shall be suspended unless and until parole is revoked.

The parole revocation restitution fine cannot be imposed unless the defendant is eligible for parole. Pen C §1202.45; see *People v Oganesyan* (1999) 70 CA4th 1178, 1183, 83 CR2d 157 (defendant sentenced to life in prison without possibility of parole not subject to fine).

### d. [§83.8] Discretion To Impose Additional Restitution Fine

Penal Code §294 permits the court to impose an additional restitution fine on defendants convicted of specified offenses. Although labeled a restitution fine, it goes to the Restitution Fund only for the purpose of being transferred to the county children's trust fund for child abuse prevention.

Offenses. The court may impose the added fine upon conviction of any of the following offenses (Pen C §294(a)):

- Pen C §273a (child abuse);
- Pen C §273d (inflicting corporal injury on child);
- Pen C §288.5 (multiple sexual conduct with child under 14);

- Pen C §§311.2–311.3 (obscene depiction of minor);
- Pen C §647.6 (child molestation);

as well as for any of the violations listed below when the victim was under the age of 14 at the time of the offense (Pen C §294(b)):

- Pen C §261 (rape);
- Pen C §264.1 (rape in concert with others);
- Pen C §285 (incest);
- Pen C §286 (sodomy);
- Pen C §288a (oral copulation);
- Pen C §289 (sexual penetration by foreign or unknown object).

*Amount.* The maximum is \$5000 for a felony and \$1000 for a misdemeanor, in addition to the mandatory restitution fine.

Ability to pay. Defendant's ability to pay is a factor in deciding whether to impose the fine and in what amount.

Hardship on victim. When the defendant is a member of the victim's immediate family, the court is to consider whether the added fine would result in hardship for the victim. Pen C §294(c).

► JUDICIAL TIP: When the court is considering a fine under Pen C §294, it should so advise the defendant and afford an opportunity for a hearing on ability to pay, victim hardship, and other relevant matters.

The California Department of Corrections (CDC) does not have the authority to collect restitution fines under Pen C §294.

### e. [§83.9] Juvenile Offenders

Juvenile offenders are also subject to mandatory restitution fines. Welf & I C §730.6. The principal features of the provisions governing juveniles are:

- The felony fine range is \$100 to \$1000; the misdemeanor fine cannot exceed \$100. There is no prescribed minimum misdemeanor fine. Welf & I C \$730.6(b)(1).
- The factors that the court should consider in setting the fine are essentially the same as for adult offenders. See Welf & I C §730.6(d)(1). See also chart in §83.10. Express findings are unnecessary and usually not made. See Welf & I C §730.6(e).
- Imposition of the fine is mandatory, except for compelling and extraordinary reasons in felony cases. The reasons must be stated on the record. Welf & I C §730.6(g). The restitution fine cannot be

- waived for misdemeanors, probably because there is no statutory minimum fine with respect to them.
- When the fine is waived, the minor must be required to perform community service except for compelling and extraordinary reasons stated on the record. Welf & I C §730.6(n), (o).
- Inability to pay does not justify failure to impose a restitution fine. Welf & I C §730.6(c). It is a factor in setting the amount of the fine. The offender has the burden of showing inability, but is not entitled to a separate hearing. Welf & I C §730.6(b), (d)(2). In determining a juvenile offender's ability to pay, the court may consider the juvenile's future earning capacity. Welf & I C §730.6(d)(2).
- Payment of the fine must be a condition of probation. Welf & I C §730.6(*l*).
- Parents and guardians may be jointly and severally liable. Welf & I C §730.7.

### f. [§83.10] Chart: Comparison of Restitution Fine Provisions for Adult and Juvenile Offenders (Pen C §§1202.4, 1202.44, 1202.45; Welf & I C §730.6)

	Adult	Juvenile
Amount of fine		
Misdemeanor	\$100-\$1000	Not more than \$100
Felony	\$200-\$10,000	\$100-\$1000
Factors for determining amount	All relevant factors including but not limited to:  • Inability to pay  • Seriousness of offense  • Circumstances of commission  • Economic gain by offender  • Losses to others from offense	
	Number of victims Optional formula for multiple felo- nies	
Burden of showing inability to pay when court sets	Offender	

	Adult	Juvenile
fine above statutory mini- mum		
Waiver		ng and extraordinary ecord; inability to pay  No waiver when offense is a misdemeanor
Community service	Mandatory when fine waived except for compelling and extraordinary reasons stated on record	
Effect of restitution to victim	Cannot be offset against fine	
Relation to probation	Payment must be condition of probation	
Probation revocation fine	Must be imposed separately in same amount as restitution fine and becomes effective on revocation of probation or of a conditional sentence	Inapplicable
Parole revocation fine	Must be imposed separately in same amount as restitution fine and suspended unless and until parole is revoked	Inapplicable

### 3. Procedure at Time of Guilty Plea

### a. [§83.11] Advisement When Taking Plea

A restitution fine is a direct consequence of a guilty or no contest plea. Accordingly, the court must advise defendant of the minimum and maximum fines. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902. For script and form, see §§83.82–83.83.

Error that results from not giving this advice is waived unless called to the attention of the trial court at or before sentencing. *People v Walker, supra*. Upon timely objection, the court must determine whether the error was prejudicial, and if so, either impose only the minimum fine or permit defendant to withdraw the plea. *People v Walker, supra*, 54 C3d at 1023–1024. The major factor in determining prejudice is the size of the fine that the court imposed. *People v Walker, supra*.

The *Walker* case should not be understood as finding that the restitution fine has been and will be subject of plea negotiations in every case. The parties are free to make any lawful bargain they choose, including leaving the imposition of fines to the discretion of the sentencing court. *People v Dickerson* (2004) 122 CA4th 1374, 1384–1385, 22 CR2d 854.

### b. [§83.12] Silent Plea Bargain

When a plea bargain fails to address the restitution fine, the court must either reduce the fine to the minimum or allow defendant to withdraw the plea. *People v Walker* (1991) 54 C3d 1013, 1028, 1 CR2d 902. Defendant does not waive this issue by failing to raise it at the time of sentencing; it may be raised on appeal. *People v Walker*, *supra*.

► JUDICIAL TIP: Counsel should be asked to state any agreement with respect to the fine when putting the proposed terms of negotiated plea on the record. When the negotiations leave the fine open, the court should explain to the defendant the minimum and maximum fines or have counsel do so and obtain defendant's oral assent.

### 4. Determination of Fine

### a. [§83.13] No Separate Hearing

The defendant is not entitled to a hearing apart from the sentencing hearing with respect to the restitution fine. Pen C §1202.4(d).

► JUDICIAL TIP: Both sides should be given an opportunity to address the matter at the sentencing hearing, because, inter alia, defendant has the burden of demonstrating inability to pay. Pen C §1202.4(d).

### b. [§83.14] Factors

Statutory factors. In determining the amount of the fine, the court should consider any relevant factor (Pen C §1202.4(d)), including:

• Inability to pay (for discussion, see §83.15);

- Seriousness of the offense;
- Circumstances of the offense;
- Defendant's economic gain, if any, from the crime;
- Pecuniary and intangible losses of victims or dependents of victims;
- Number of victims.

Criminal record. Defendant's criminal record is a relevant factor. People v Griffin (1987) 193 CA3d 739, 741–742, 238 CR 371; Cal Rules of Ct 4.411.5, 4.414.

*Optional formula*. In multicount felony cases the court may set the fine by using the formula stated in Pen C §1202.4(b)(2). See §83.16.

*Juveniles*. Factors to consider in juvenile cases are virtually the same as in cases involving adult offenders. See chart in §83.10.

### c. [§83.15] Ability To Pay

Defendant is presumed to be able to pay the restitution fine and has the burden of demonstrating inability. Pen C §1202.4(d); *People v Romero* (1996) 43 CA4th 440, 448–449, 51 CR2d 26.

The court may consider future earning capacity. Pen C §1202.4(d); *People v Gentry* (1994) 28 CA4th 1374, 1376–1377, 34 CR2d 37 (court may consider defendant's future prison wages as well as possibility of employment when defendant is released from prison).

The court must impose the minimum fine even when defendant is unable to pay it. Pen C §1202.4(c); Welf & I C §730.6(b); *People v Draut* (1999) 73 CA4th 577, 582, 86 CR2d 469. The court may consider inability to pay only when increasing the amount of the restitution fine in excess of the \$200 or \$100 minimum. Pen C §1202.4(c).

Such a mandate is not constitutionally infirm; however, imprisonment of an indigent defendant for nonpayment violates equal protection. *People v Long* (1985) 164 CA3d 820, 826–827, 210 CR 745. A defendant who *has* the financial ability to pay restitution as a condition of probation *may* be imprisoned for willfully refusing to do so and the defendant's probation may be revoked. *People v Lawson* (1999) 69 CA4th 29, 35–36, 81 CR2d 283.

► JUDICIAL TIP: Requiring a defendant to complete the Judicial Council asset disclosure form CR-115 (see §83.85) will help in assessing the defendant's ability to pay.

### d. [§83.16] Multiple Counts

*Discretionary formula*. For defendants convicted of several felony counts the court may calculate the fine by the following formula (Pen C §1202.4(b)(2)):

\$200 x number of years of sentence x number of counts of which defendant was convicted.

JUDICIAL TIP: Some judges simplify the formula to \$200 x number of counts. In the view of some judges, a life sentence calls for the maximum fine.

Limitation of maximum. The total fine may not exceed the statutory maximum, regardless of the number of victims and counts. People v Blackburn (1999) 72 CA4th 1520, 1534, 86 CR2d 134. See also People v Ivans (1992) 2 CA4th 1654, 1667, 4 CR2d 66 (decided under former Govt C §13967). When the defendant is convicted of crimes in two cases that are consolidated for trial, the court may not impose restitution fines in both cases, even if the cases involve charges in separately filed informations. People v Ferris (2000) 82 CA4th 1272, 1277–1278, 99 CR2d 180.

# e. [§83.17] No Joint and Several Liability for Restitution Fines

Restitution fines (Pen C §1202.4(b)), probation revocation fines (Pen C §1202.44), and parole revocation fines (Pen C §1202.45) may not be imposed as payable jointly and severally by multiple defendants. *People v Kunitz* (2004) 122 CA4th 652, 655–658, 18 CR3d 843 (although court addressed only Pen C §\$1202.4(b) and 1202.45 fines, reasoning applicable to Pen C §1202.44 fine).

Direct victim restitution is not punishment, and it may be imposed jointly and severally. 122 CA4th at 657. For discussion, see §83.62.

### f. [§83.18] Findings

The court need not specify reasons for setting the fine in any particular amount; only when the court waives the fine must reasons be stated. Pen C §1202.4(b), (d); *People v Romero* (1996) 43 CA4th 440, 448, 51 CR2d 26 (court not required to make findings on ability to pay); *People v Gragg* (1989) 216 CA3d 32, 46, 264 CR 765; for discussion of fine waiver, see §83.20.

► JUDICIAL TIP: Some judges state reasons when they set the fine at a level that departs from their usual practice.

The amount of the fine is reviewed only for abuse of discretion and upheld when supported by the record. *People v McGhee* (1988) 197 CA3d

710, 716–717, 243 CR 46 (maximum restitution fine justified when court properly imposed upper prison term); *People v Griffin* (1987) 193 CA3d 739, 740–742, 238 CR 371 (record of recidivist thief convicted of petty theft with prior supports \$2000 restitution fine).

### g. [§83.19] Retrial or Remand for Resentencing

The court may not increase the restitution fine after a retrial that followed defendant's successful appeal (*People v Thompson* (1998) 61 CA4th 1269, 1276, 71 CR2d 586; *People v Jones* (1994) 24 CA4th 1780, 1785, 30 CR2d 238), or after remand for resentencing following the defendant's partially successful appeal (*People v Hanson* (2000) 23 C4th 355, 366–367, 97 CR2d 58). Such an increase in the restitution fine is precluded by the state constitutional prohibition against double jeopardy (Cal Const art I, §15). 23 C4th at 366–367.

### 5. [§83.20] Waiver of Fine

The court must impose a restitution fine unless it finds "compelling and extraordinary reasons" for not doing so and states them on the record. Pen C §1202.4(b), (c); *People v Tillman* (2000) 22 C4th 300, 302, 92 CR2d 741.

Inability to pay is not an adequate reason for waiving the fine. Pen C §1202.4(c). There is no judicial guidance on what constitutes compelling and extraordinary reasons. Sentencing a defendant to prison is not a sufficient reason because the fine can be collected from prison wages and trust account deposits. See §83.23.

► JUDICIAL TIP: Some judges waive the fine in the case of street people who suffer from mental or other disabilities. Others excuse payment when the defendant is on SSI or receives General Assistance. Most judges do not regard being jobless or homeless standing alone a sufficient reason.

When the court waives the fine, it must order the defendant to perform community service instead, unless it finds additional compelling and extraordinary reasons stated on the record. Pen C §1202.4(n); for suggestions, see Checklist, §83.2.

The prosecution waives any objection to the trial court's failure to impose a restitution fine under Pen C §1202.4 by failing to object to the omission at the time of sentencing; in such event, the appellate court may not modify the judgment to add a restitution fine. *People v Tillman, supra,* 22 C4th at 302–303. However, when the trial court imposes a restitution fine under Pen C §1202.4, but omits or imposes an erroneous parole revocation restitution fine under Pen C §1202.45 (see §83.7) and the prosecution does not object to this omission, an appellate court has the authority

to modify the judgment to impose or correct the fine. *People v Smith* (2001) 24 C4th 849, 102 CR2d 731 (trial court imposed \$5000 restitution fine but only a \$200 parole revocation fine); *People v Rodriguez* (2000) 80 CA4th 372, 375–379, 95 CR2d 299 (trial court imposed \$200 restitution fine and no parole revocation fine).

## 6. [§83.21] No Crediting Amount of Restitution Against Restitution Fine

At one time a defendant who was not placed on probation was entitled to a credit against the restitution fine in the amount of the restitution that defendant had been ordered to pay to the victim. See former Govt C \$13967(c); *People v Farsight* (1998) 64 CA4th 1402, 1408, 75 CR2d 858; *People v Cotter* (1992) 6 CA4th 1671, 1677, 8 CR2d 606.

Now, however, Pen C §1202.4 does not differentiate between defendants who are granted probation and those who are not; it mandates a restitution fine "in every case where a person is convicted of a crime" (Pen C §1202.4(b)), as well as restitution to victims (Pen C §1202.4(a)(3), (f)). *People v Blackburn* (1999) 72 CA4th 1520, 1534, 86 CR2d 134. Accordingly, in the opinion of most judges, the court must impose at least the minimum fine regardless of the amount of restitution ordered.

### 7. [§83.22] Penalty Assessments; Administrative Fees

Restitution fines, probation revocation restitution fines, and parole revocation restitution fines are exempt from the penalty assessments of Pen C §1464 and Govt C §76000. Pen C §1202.4(e); *People v McHenry* (2000) 77 CA4th 730, 733–734, 91 CR2d 877; *People v Terrell* (1999) 69 CA4th 1246, 1256, 82 CR2d 231.

Counties may impose a fee to cover the administrative costs of collecting the restitution fine. The fee may not exceed 10 percent of the fine. Pen C §1202.4(*l*).

► JUDICIAL TIP: In counties that charge this fee the sentence should include an order to pay it.

### 8. [§83.23] Collection of Fine by CDC and CYA

The California Department of Corrections (CDC) deducts restitution fines from prisoners wages and trust account deposits, transmits the moneys to the California Victim Compensation and Government Claims Board. Pen C §2085.5; see, *e.g.*, *People v Gentry* (1994) 28 CA4th 1374, 1377–1378, 34 CR2d 37.

### **►** JUDICIAL TIPS:

- Penal Code §2085.5 is self-executing and it is not necessary to refer to it when imposing sentence. If the judge chooses to make a reference, the judge should make it clear that the fine is imposed under Pen C §1202.4 and shall be collected under Pen C §2085.5. Court documents should not state that the fine is imposed under Pen C §2085.5. See People v Rowland (1988) 206 CA3d 119, 124, 253 CR 190.
- Courts should make sure that the abstract of judgment reflects the restitution fine because the CDC relies on the abstract. See *People v Hong* (1998) 64 CA4th 1071, 1080, 76 CR2d 23.

The California Youth Authority (CYA) also collects restitution fines from wards' wages and trust account deposits and transfers the moneys to the California Victim Compensation and Government Claims Board. The CYA must provide the sentencing court with a record of payments. Welf & I C §§1752.81–1752.82.

### 9. [§83.24] Fine Enforceable as Civil Judgment

An order to pay a restitution fine is enforceable as if it were a civil judgment. Pen C §1214(a). Restitution fines derived from misdemeanor cases, cases involving a violation of a city or town ordinance, and non-capital cases with a plea of guilty or no contest, are enforceable in the same manner as a money judgment in a *limited* civil case. Pen C §1214(c); CCP §582.5.

A restitution fine is enforceable immediately and continues to be enforceable by the California Victim Compensation and Government Claims Board after termination of probation or parole. Pen C §1214(a).

► JUDICIAL TIP: The court should *not* enter a separate money judgment. Execution can issue on the order to pay the fine. *People v Hart* (1998) 65 CA4th 902, 906, 76 CR2d 837.

### 10. [§83.25] Restitution Fine in Bribery Cases

The court must impose restitution fines that exceed those required under Pen C §1202.4 on defendants convicted of specified bribery offenses.

*Offenses*: The court must impose the fine on conviction of any of the following offenses:

• Pen C §68 (asking for, receiving, or agreeing to receive, bribe by officer, employee, or appointee of state or local government);

- Pen C §86 (asking for, receiving, or agreeing to receive, bribe by member of state legislature);
- Pen C §93 (asking for, receiving, or agreeing to receive, bribe by judicial officer or other person authorized to determine matters in controversy).

Amount. In cases in which no bribe was received, the minimum fine is \$2000 up to a maximum of \$10,000. When a bribe has been received, the minimum fine is \$2000 or the amount of the bribe, whichever is greater, and not more than \$10,000 or double the amount of the bribe, whichever is greater. Pen C §§68(a), 86, 93(a).

Ability to pay. Defendant's ability to pay is a factor in deciding whether to impose the fine and in what amount. Pen C §§68(b), 86, 93(b).

### **B.** Restitution Fee in Diversion Matters

### 1. [§83.26] Mandatory Fee; Amount

In diversion and deferred entry of judgment cases the counterpart to the restitution *fine* is the restitution *fee* required by Pen C §1001.90. Imposition is mandatory (Pen C §1001.90(a), (c)), subject to exceptions discussed in §83.27.

The minimum fee is \$100; the maximum, \$1000. Pen C §1001.90(b). The factors that should guide the court in setting the amount of the fee are essentially the same as apply to restitution fines. Pen C §1001.90(d); for discussion, see §83.14. The court may not modify the amount of the fee except to correct an error in setting the amount. Pen C §1001.90(e).

► JUDICIAL TIP: Modification is probably warranted only when the fee was erroneously omitted, set below the statutory minimum or above the maximum, and to correct ministerial errors. Forgiveness of the fee upon successful completion of diversion is probably precluded.

Counties may add a collection fee not to exceed 10 percent of the restitution fee. Pen C §1001.90(g).

Like restitution fines, the fee goes to the state Restitution Fund. Pen C §1001.90(f).

### 2. [§83.27] Exceptions

As with restitution fines, the court may waive the fee when it finds that there are compelling and extraordinary reasons and states them on the record. Pen C §1001.90(c). The fee must be imposed regardless of defendant's ability to pay it; ability to pay is, however, a factor to be considered in setting the amount. Pen C §1001.90(c), (d).

Additionally, Pen C §1001.90 does not apply to diversion of defendants with cognitive developmental disabilities. Pen C §1001.90(a).

### C. Victim Restitution

### 1. [§83.28] Mandatory and Discretionary Restitution

The court must order payment of restitution when the crime of which defendant was convicted resulted in economic loss to the victim. Pen C §1202.4; Welf & I C §730.6; see Cal Const art I, §28(b). A sentence without a restitution award to a victim, as mandated by Cal Const art I, §28(b) and Pen C §1202.4 (or an alternative statement of extraordinary reasons) is invalid; the only discretion retained by the court is that of fixing the amount of the award. *People v Rowland* (1997) 51 CA4th 1745, 1751–1752, 60 CR2d 351. For discussion, see §§83.36–83.70.

Under some circumstances California courts may order restitution when the crime of which defendant was convicted did not cause the loss. For example, courts often order a defendant to make restitution to a victim of offenses that underlie dismissed counts. For discussion, see §§83.72–83.80; principles that apply to both mandatory and discretionary restitution are discussed in §§83.29–83.34.

### 2. Principles Applicable to Restitution Generally

### a. Procedure at Time of Guilty Plea

### (1) [§83.29] Advisement When Taking Plea

Restitution is a direct consequence of a guilty or no contest plea of which defendant must be advised. *People v Rowland* (1997) 51 CA4th 1745, 1751, 60 CR2d 351; *People v Valdez* (1994) 24 CA4th 1194, 1203, 30 CR2d 4. For forms, see §§83.82–83.83.

Failure to so advise is fatal only if it prejudices the defendant. *People v Rowland, supra* (no prejudice because, inter alia, amount of restitution ordered matched defendant's civil liability).

### (2) [§83.30] Silent Plea Bargain

A silent plea bargain does not circumscribe the mandatory duty of the trial court to order the payment of restitution. *People v Valdez* (1994) 24 CA4th 1194, 1203, 30 CR2d 4; see *People v Campbell* (1994) 21 CA4th 825, 829, 26 CR2d 433 (silent plea agreement did not nullify restitution order as condition of probation).

### b. [§83.31] Right to Notice and Hearing

Victims and defendants have a right to a hearing and to notice. For discussion, see §§83.38–83.41.

### c. [§83.32] Restitution Not Affected by Bankruptcy

Defendant's bankruptcy. The Bankruptcy Code does not apply to restitution orders. People v Washburn (1979) 97 CA3d 621, 158 CR 822. A restitution obligation imposed as a condition of probation is not dischargeable in a liquidation or "straight bankruptcy" proceeding under Chapter 7 (11 USC §§701 et seq). Kelly v Robinson (1986) 479 US 36, 50–53, 107 S Ct 353, 93 L Ed 2d 216; 11 USC §523(a)(7). See also In re Warfel (BAP 9th Cir 2001) 268 BR 205, 209–213 (civil restitution judgment originally imposed as a condition of debtor's probation not dischargeable under Chapter 7). Nor is a restitution obligation dischargeable under Chapter 13 (11 USC §§1301 et seq). 11 USC §1328(a)(3).

Bankruptcy does not block restitution even when defendant's civil obligations to the victim were discharged by bankruptcy *before* criminal charges were filed. *People v Moser* (1996) 50 CA4th 130, 136, 57 CR2d 647.

Because collection of restitution is a continuation of a criminal action, the automatic stay provisions of bankruptcy law do not apply. See *In re Gruntz* (9th Cir 2000) 202 F3d 1074, 1084–1087 (automatic stay did not enjoin state court criminal proceedings against debtor for failure to pay child support); 11 USC §362(b)(1).

Victim's bankruptcy. When the victim incurred an obligation to a third party as a result of defendant's conduct, the bankruptcy discharge of the victim's obligation does not prevent a restitution order. *People v Dalvito* (1997) 56 CA4th 557, 560–562, 65 CR2d 679 (bankruptcy is economic loss despite discharge; no explanation why loss is equal to amount of obligation).

### d. [§83.33] Order Enforceable as Civil Judgment

An order to pay restitution is deemed a money judgment and enforceable as if it were a civil judgment. Pen C §§1202.4(i), 1214(b); Welf & I C §730.6(r). Restitution orders derived from misdemeanor cases, cases involving a violation of a city or town ordinance, and noncapital cases with a plea of guilty or no contest, are enforceable in the same manner as a money judgment in a *limited* civil case. Pen C §1214(c); CCP §582.5.

The following conditions must be met before a restitution order may be enforced as if it were a civil judgment (Pen C §1214(b)):

- (1) The defendant was informed of the right to have a judicial determination of the amount, and
  - (2) the defendant was
  - Provided with a hearing,
  - Waived a hearing, or

• Stipulated to the amount of restitution.

In addition, Pen C §1214(b) gives victims and the California Victim Compensation and Government Claims Board the right to receive on request a certified copy of the restitution order and the defendant's financial disclosure (see §83.68). See also Welf & I C §730.7(c) (victims of juvenile offenses entitled to certified copy of restitution order). If requested, the court must provide the financial disclosure to the district attorney in connection with an investigation or prosecution involving perjury or the veracity of the information contained in the disclosure. Pen C §1214(b).

Penal Code §1214(b) also gives victims "access to all resources available under the law to enforce the restitution order," including, inter alia, wage garnishment and lien procedures.

A restitution order is enforceable immediately and continues to be enforceable by the victim after termination of defendant's probation or parole. Pen C §§1214(b), 1202.4(m); Welf & I C §730.6(*l*).

■ JUDICIAL TIP: Enforcement, like a judgment, should not be confused with the actual entry of a civil judgment based on the order to pay restitution. Judges should not at any time order the entry of such a judgment. However, it is entirely proper for the judge to order the appropriate civil clerk to issue enforcement of judgment orders, such as writs of execution, to victims with a restitution order. See People v Hart (1998) 65 CA4th 902, 906, 76 CR2d 837. But see People v Farael (1999) 70 CA4th 864, 866–867, 83 CR2d 16 (on conviction of insurance fraud, court properly required defendant as condition of probation to sign confession of judgment in insurer's favor in amount of its investigation costs; appellate court found "no practical or legal difference between a restitution order and a confession of judgment for the purpose of restitution").

### e. [§83.34] Penalty Assessments

Restitution orders are not subject to the penalty assessments of Pen C §1464 or Govt C §76000. Unlike penalty assessments, restitution is not collected by the courts, but is ordered payable directly to the victim. *People v Dorsey* (1999) 75 CA4th 729, 734–737, 89 CR2d 498; *People v Martinez* (1999) 73 CA4th 265, 267–268, 86 CR2d 346.

### f. [§83.35] Persons Found Not Guilty by Reason of Insanity

Article I, §28(b), of the California Constitution, and Pen C §1202.4(a) refer to restitution from the persons *convicted* of crimes. A person found not guilty by reason of insanity (NGI) is not a convicted person.

People v Morrison (1984) 162 CA3d 995, 998, 208 CR 800; Newman v Newman (1987) 196 CA3d 255, 259, 241 CR 712 (defendant found NGI is not "convicted" within meaning of CCP §340.3). Although there is no California case on point dealing with restitution in NGI cases, other states have ruled on the issue and concluded that there is no authority to order restitution in these cases. See State v Heartfield (Ariz 2000) 998 P2d 1080; State v Gile (Or App 1999) 985 P2d 199 (defendant found NGI not subject to assessment similar to Pen C §1202.4 restitution fine).

### 3. Mandatory Restitution

# a. [§83.36] Conditions That Bring Case Within Pen C §1202.4 and Welf & I C §730.6

Penal Code §1202.4 or its counterpart for juvenile offenders, Welf & I C §730.6, apply when all four of the following conditions are present:

- (1) a claim by a victim (see §§83.43–83.46)
- (2) who suffered an economic loss (see §§83.47–83.53; victim of felony violation of Pen C §288 entitled to restitution for noneconomic losses (Pen C §1202.4(f)(3)(F))
  - (3) as a result of the commission of a crime
- (4) of which the defendant was convicted (Pen C §1202.4(a)(1); see *People v Carbajal* (1995) 10 C4th 1114, 43 CR2d 681).

When some of these conditions are not met, the court may have discretion to order restitution. For discussion, see §§83.72–83.80.

### b. [§83.37] Presentence Investigation Report

A probation officer's presentence investigation report must include information and recommendations pertaining to restitution fines and victim restitution. Pen C  $\S1203(b)(2)(C)$ , (d), (g). Specifically, the report must include:

- Information concerning the victim of the crime, including the victim's statement, the amount of the victim's loss, and whether that loss is covered by the victim's or defendant's insurance (Cal Rule of Ct 4.411.5(a)(5); for discussion of the effect of insurance on restitution awards, see §83.55);
- A statement of mandatory and recommended restitution, restitution fines, and other fines and costs to be assessed against the defendant (Cal Rule of Ct 4.411.5(a)(11)); and
- Findings concerning a defendant's ability to make restitution and pay any fine (Cal Rule of Ct 4.411.5(a)(8), (11)).

If, as is typical in misdemeanor cases, no probation report is prepared for sentencing, the court may consider any information that could have been included in a probation report. Pen C §1203(d).

Financial evaluation. The court may order the defendant to appear before a county financial evaluation officer, if available, for an evaluation of the defendant's ability to make restitution. Pen C §1203(j). The county officer must report findings regarding restitution and other court-related costs to the probation officer on the question of the defendant's ability to pay those costs. Pen C §1203(j).

### c. Hearing

### (1) [§83.38] Right to Hearing

Defendant. The defendant has the right to a court hearing to dispute the amount of restitution or the manner in which it is to be made. Pen C §§1202.4(f)(1), 1203(d), 1203.1k; People v Carbajal (1995) 10 C4th 1114, 1125, 43 CR2d 681. Juvenile offenders have the same right. Welf & I C §730.6(h)(1). Advisement of this right is a precondition to enforcement of the restitution order by a victim. Pen C §1214(b); for discussion, see §83.33; for more on notice, see §83.39.

Victim. A victim has a right to appear at sentencing personally or by counsel to express his or her views regarding restitution. Pen C §1191.1. This right also extends to:

- The parents or guardians of a victim who is a minor (Pen C §1191.1);
- The next of kin of a deceased victim (Pen C §1191.1);
- An insurer or employer victimized by workers' compensation fraud (Pen C §1191.10);
- The California Victim Compensation and Government Claims Board when enforcing its subrogation rights (Pen C §1202.4(f)(2); see §83.61).

### (2) [§83.39] Notice

Defendant. The court should inform the defendant of the right to a hearing to contest restitution. See Pen C §§1202.4(f)(1) (right to hearing), 1214(b); People v Carbajal (1995) 10 C4th 1114, 1125, 43 CR2d 681. The consequences of failing to provide this information differ depending on whether the court follows the recommendations of the probation report:

• If the court does not order more restitution than the report recommends, failure to request a hearing waives any error. *People v* 

Foster (1993) 14 CA4th 939, 949, 18 CR2d 1; People v Blankenship (1989) 213 CA3d 992, 997, 262 CR 141.

- ► JUDICIAL TIP: Some judges obtain an express waiver of hearing when the defendant does not contest restitution. This forestalls later objections to civil enforcement of the restitution order based on a lack of hearing.
  - However, when the court exceeds the recommendations without first bringing that prospect to the defendant's attention and affording the defendant an opportunity to contest it, the defendant has been deprived of any meaningful opportunity to be heard. See *People v Sandoval* (1989) 206 CA3d 1544, 1550, 254 CR 674. See also *People v Thygesen* (1999) 69 CA4th 988, 993, 81 CR2d 886.
- ► JUDICIAL TIP: When the judge contemplates ordering more restitution than the probation officer recommended, the judge should indicate this before making an order and should inquire whether the defendant desires a hearing.

Victim. The probation officer has the duty to notify the victim of

- All sentencing proceedings or juvenile disposition hearings,
- The right to appear, and
- The right to express his or her views. Pen C §§679.02(a)(3), 1191.1.

The probation officer must also provide the victim with timely written information concerning the court's duty to order restitution and the victim's

- Right to civil recovery against the defendant;
- Right to a copy of the restitution order from the court;
- Right to enforce the restitution order as a civil judgment;
- Responsibility to provide information about losses to the probation department, district attorney, and court; and
- Opportunity to be compensated from the Restitution Fund. Pen C §§679.02(a)(8), 1191.2.
- ► JUDICIAL TIP: When there is no probation referral, as is often the case with misdemeanors, the prosecutor should notify the victim unless the county has another agency in charge of victim restitution that notifies victims.

In cases of juvenile offenders the obligation to notify is limited to offenses that would have been felonies if committed by an adult. Pen C §679.02(a)(4).

Designated agencies are required to develop and make available a "notification of eligibility" card for victims and derivative victims that includes specified information about eligibility to receive payment from the Restitution Fund for losses resulting from the crime. Pen C §1191.21(a). The law enforcement officer with primary responsibility for investigating the crime and the district attorney may provide this card to the victim and any derivative victims. Pen C §1191.21(b).

► JUDICIAL TIP: To spare victims court appearances that are unnecessary because defendant does not contest restitution, some judges initially make only uncontested orders. They continue the case when the defendant plans to challenge restitution; the victim is invited to attend the continued hearing.

### (3) [§83.40] Nature of Restitution Hearing

A restitution hearing does not require the formalities of a trial. *People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131. Thus

- Defendant has no right to a jury trial on restitution issues (*People v Rivera* (1989) 212 CA3d 1153, 1161, 261 CR 93).
- Defendant has no right to confront and cross-examine witnesses, including the probation officer who prepared the probation report.
   People v Cain (2000) 82 CA4th 81, 86–88, 97 CR2d 836 (no right to cross-examine psychotherapist whose fees defendant was ordered to reimburse under Pen C §273.5(h)(2)).
- Victims have a right to express their views (Pen C §1191.1).
- The court may consider the recommendations in the presentence report despite their hearsay character (*People v Cain, supra,* 82 CA4th at 87–88; Pen C §§1203(b)(2)(C)(ii), 1203.1k), as long as the court independently determines the amount of restitution (*People v Hartley, supra*).
- The evidentiary requirements for establishing a victim's economic losses are minimal. The court must base its determination on the "amount of loss claimed by the victim or victims or any other showing to the court." Pen C §1202.4(f). A victim may submit estimates of losses. People v Goulart (1990) 224 CA3d 71, 82–83, 273 CR 477. An owner of property is always entitled to give an opinion of its value. Evid C §813.
- Documentary evidence such as bills, receipts, repair estimates, insurance payment statements, payroll stubs, business records, and similar documents relevant to the value of stolen or damaged property, medical expenses, and wages and profits lost may not be excluded as hearsay evidence. Pen C §1203.1d(d).

- ► JUDICIAL TIP: Restitution hearings should not further victimize victims by long courtroom waits or multiple hearings. This problem often arises in misdemeanor cases that involve long calendars and that lack probation reports. To minimize delays for victims some judges
  - Instruct courtroom clerks to ascertain cases in which victims are present and call these cases first; and
  - Permit victims to present restitution information without delay when an out-of-custody defendant is absent, on a determination and finding that defendant's absence is voluntary and with knowledge of the hearing. See Pen C §1043 for a similar procedure at trial. Merely asking the victim to hand papers to the clerk and deferring the restitution determination may create confusion and an inadequate record.

### (4) [§83.41] Burden of Proof

Defendant has the burden of showing that the restitution recommendation in the probation report or the victims' estimates are inaccurate. *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1; *People v Hartley* (1984) 163 CA3d 126, 130, 209 CR 131.

### d. [§83.42] Ability To Pay

Defendant's inability to pay has no bearing on making a restitution order:

- It is not a compelling and extraordinary reason that justifies failing to impose restitution; and
- It cannot be considered in determining the amount of restitution. Pen C §1202.4(g).

However, ability to pay is vital in three other respects:

- (1) At the time of making the restitution order the court needs to make an ability-to-pay determination in order to decide whether to make an income deduction order. Pen C §1202.42(a); for discussion, see §83.64.
- (2) Ability to pay becomes important if the defendant fails to pay restitution; it is a precondition to revoking probation or imprisoning defendant for failure to pay. See, *e.g.*, *People v Whisenand* (1995) 37 CA4th 1383, 1393, 44 CR2d 501. See §83.60.
- (3) A defendant who claims inability to pay for losses covered by a *Harvey* waiver is entitled to a judicial determination of ability to pay. For discussion, see §83.75.

### e. Persons Entitled to Restitution

### (1) [§83.43] Direct Victims

Restitution under Pen C §1202.4 is generally limited to direct victims; *i.e.*, to persons against whom the crime was committed. *People v Torres* (1997) 59 CA4th 1, 5, 68 CR2d 644; *People v Valdez* (1994) 24 CA4th 1194, 1200, 30 CR2d 4 (victim is person who is object of crime).

A direct victim of crime does not have to be an individual. Corporations, business trusts, estates, trusts, partnerships, associations, joint ventures, governments and governmental agencies, or any other legal or commercial entities are included in the definition of "direct victim." Pen C §1202.4(k)(2). See, e.g., People v Ortiz (1997) 53 CA4th 791, 795–799, 62 CR2d 66 (defendant convicted of selling counterfeit tapes; trial court properly found record company trade association was a direct victim and was entitled to restitution for both investigation expenses and lost sales).

■ JUDICIAL TIP: Caution is advisable when counsel refers to statutes other than Pen C §1202.4 for the purpose of defining who is a victim. See, e.g., a narrower definition in Govt C §§13951(c), (g), 13955, dealing with persons entitled to compensation from the Restitution Fund, and Pen C §1191.10. These definitions do not limit who qualifies as a victim under Pen C §1202.4. See, e.g., People v Broussard (1993) 5 C4th 1067, 1077, 22 CR2d 1078 (persons entitled to restitution not limited to those who qualify for assistance from Restitution Fund); People v Valdez, supra, 24 CA4th at 1199.

### (2) [§83.44] Governmental Agencies

A governmental agency may be a direct victim of the defendant's crime under Pen C §1202.4(k). For example, a defrauded governmental agency is a direct victim entitled to restitution for its losses. See *People v Crow* (1993) 6 C4th 952, 957, 26 CR2d 1 (welfare fraud); *People v Hudson* (2003) 113 CA4th 924, 927–930, 7 CR3d 114 (discussion of how to calculate restitution to defrauded government agency). See also *In re Johnny M.* (2002) 100 CA4th 1128, 123 CR2d 316 (school district is direct victim entitled to restitution from minor who vandalized school property in amount that included reimbursement for property damage and labor costs of salaried employees who repaired the damage).

Governmental units are often indirect victims, not entitled to restitution. For example:

A law enforcement agency that bought illicit drugs from the defendant does not qualify for restitution for the funds expended.
 People v Torres (1997) 59 CA4th 1, 5, 68 CR2d 644 (overhead

- expenses costs incurred in the course of regular investigatory duties not recoverable).
- A city may not be awarded restitution for workers' compensation payments to a police officer who was injured by defendant's criminal act. *People v Franco* (1993) 19 CA4th 175, 183–186, 23 CR2d 475 (city may pursue civil action under Lab C §3852 to collect restitution).
- A public agency may not be awarded restitution under Pen C §1202.4 for costs to investigate crimes or apprehend criminals. *People v Ozkan* (2004) 124 CA4th 1072, 1076–1077, 21 CR3d 854 (Board of Equalization entitled to recover costs under Bus & P C §12015.5).

As illustrated in some of the above cases, statutes often give governmental agencies other remedies to obtain reimbursement for expenditures attributable to defendant's conduct. Other examples include:

- Emergency response to DUI auto accident. The court can order restitution to a public agency for expenses incurred in its emergency response to a DUI auto accident. Govt C §53150; Pen C §1203.1(e).
- *Fire suppression*. Fire departments can receive restitution expenses incurred in putting out a fire that was negligently or unlawfully set. Related rescue and emergency medical costs are also recoverable. Health & S C §13009. See also *In re Brian N*. (2004) 120 CA4th 591, 594, 15 CR3d 337 (fire department a direct victim entitled to restitution for cost of extinguishing unlawful fire under Welf & I C §730.6).
- Medical examination. The court can order restitution to a law enforcement agency for the cost of a medical examination conducted in child abuse or neglect cases and in sexual assault cases. Pen C §1203.1h.
- *Emergency response*. The court can order restitution to a public agency for costs incurred due to their response to an emergency. Pen C §1203.11
- *Drug disposal*. The court can order restitution to a public agency for the cleanup and disposal costs of a drug lab site. Health & S C §§11470.1, 11470.2.
- Child stealing cases. The court must order the payment of restitution to the district attorney for any costs incurred in locating and returning a child to the custodial parent. Pen C §278.6(c); Fam C §3134.

 Criminal threat cases. The court must order payment to a public or private entity for costs incurred stemming from an emergency response to a false bomb threat or to a false threat to use a weapon of mass destruction. Pen C §422.1.

### (3) [§83.45] Insurance Companies

An insurance company that has paid the crime losses of its insured under the terms of an insurance policy is not a direct victim of crime and has no right to restitution. *People v Birkett* (1999) 21 C4th 226, 231, 245, 87 CR2d 205 (court also lacks discretion to divide restitution between victim and insurer). However, when the defendant is convicted of submitting false claims to an insurance company, the insurance company is considered to be a direct victim of the defendant's crime and thus entitled to restitution. *People v O'Casey* (2001) 88 CA4th 967, 106 CR2d 263 (workers compensation fraud); *People v Moloy* (2000) 84 CA4th 257, 100 CR2d 676.

### (4) [§83.46] Others

Other persons entitled to restitution under Pen C §1202.4 include:

- The immediate surviving family of the actual victim. Pen C §1202.4(k)(1).
- Parents and guardians of a victim who is a minor. Pen C §1202.4(f)(3)(D) and (E); for discussion, see §83.51.
- Any person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions (Pen C §1202.4(k)(3)):
  - At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim.
  - At the time of the crime was living in the victim's household.
  - At the time of the crime was a person who had previously lived in the victim's household for at least two years in a relationship substantially similar to that of a parent, grandparent, sibling, spouse, child, or grandchild.
  - Is another family member of the victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime.
  - Is the primary caretaker of a minor victim.
- Any person who is eligible to receive assistance from the Restitution Fund under the California Victim Compensation Program (Govt C §§13950–13969.7). Pen C §1202.4(k)(4).

For discussion of restitution payments to the state Restitution Fund, see §83.61.

#### f. Losses Subject to Restitution; Amount

#### (1) [§83.47] Full Restitution for Economic Losses

Penal Code §1202.4 requires

- (a) *full* restitution (subject only to an exception for compelling and extraordinary reasons (Pen C §1202.4(f), (g); for discussion of the exception, see §83.56))
- (b) for *economic* losses determined by the court. Pen C  $\S1202.4(a)(1)$ , (f)(3).

Two kinds of losses not covered by Pen C §1202.4 are:

- Noneconomic losses (e.g., psychological harm) except those suffered by victims of felony violations of Pen C §288; and
- Losses that did not result from the crime of which defendant was convicted. Pen C §1202.4(a)(1), (f)(3)(F); for basis of restitution other than Pen C §1202.4, see §§83.72–83.81.

### (2) [§83.48] Components of Economic Loss

Penal Code §1202.4(f)(3) lists a number of losses and expenditures that qualify as recoverable economic losses (see §§83.49–83.54). The list is not inclusive; the statute provides broad discretion with respect to the type of losses subject to a restitution order. Pen C §1202.4(f)(3) ("losses... including, but not limited to ..."); *In re Johnny M.* (2002) 100 CA4th 1128, 1135–1136, 123 CR2d 316.

#### (a) [§83.49] Property Damages or Loss

Victims have a right to restitution "for the value of stolen or damaged property," defined as the replacement cost of like property or the cost of repairing it when repair is possible. Pen C §1202.4(f)(3)(A).

Restitution for property that is damaged but can be repaired is the lesser of the following:

- Market value before the crime minus market value after it; or
- The reasonable cost of repairing the property to its condition before defendant damaged it. See *People v Yanez* (1995) 38 CA4th 1622, 1627, 46 CR2d 1 (interpreting language in former Pen C §1203.04 very similar to Pen C §1202.4(f)(3)(A)); *In re Johnny M*. (2002) 100 CA4th 1128, 123 CR2d 316 (minor who vandalized school property ordered to pay restitution in amount that included

reimbursement for property damage and labor costs of salaried employees who repaired the damage).

Restitution may be ordered for cleanup, repair, or replacement of property damaged by parties who refused to comply with order to disperse. Pen C §416(b).

Stolen property. For most types of stolen property, original cost is a fair approximation of replacement cost. *People v Foster* (1993) 14 CA4th 939, 946, 18 CR2d 1. Accordingly, the court may consider a victim's statement of what the property cost, as set out in the probation report. It is up to the defendant to contest the valuation. *People v Foster, supra*.

Appreciated property. When the value of stolen property appreciates after the theft, as may happen with securities, the court may order restitution in the amount of the appreciated value. See *People v Tucker* (1995) 37 CA4th 1, 4–6, 44 CR2d 1 (embezzled mutual fund shares; decision based on former Pen C §1203.04).

JUDICIAL TIP: The converse is not true in the view of most judges. When shares decline in value after defendant embezzled them, defendant should not get a windfall; defendant's crime deprived the victim of the opportunity to sell the shares before their value dropped.

#### (b) [§83.50] Medical and Counseling Expenses

Medical expenses are a proper item of restitution (Pen C §1202.4(f)(3)(B)) and include future expenses. *People v Phelps* (1996) 41 CA4th 946, 949–951, 48 CR2d 855. Victims also have a right to restitution for mental health counseling expenses. Pen C §1202.4(f)(3)(C). See *People v O'Neal* (2004) 122 CA4th 817, 820–821, 19 CR3d 202 (defendant convicted of sexual molestation ordered to pay restitution for psychological counseling expenses incurred by victim's brother).

Other statutes provide for restitution of medical and counseling expenses in specific situations. For example:

- Defendants convicted of the following offenses may be ordered to reimburse a victim for reasonable costs of counseling and other reasonable expenses as condition of probation:
  - Domestic battery (see Pen C §243(e)(2)(B)),
  - Spousal rape (see Pen C  $\S 262(e)(2)$ ),
  - Spousal abuse (see Pen C  $\S 273.5(h)(2)$ ), and
  - Violation of protective order (see Pen C §273.6(h)(2)).

- Defendants convicted of the sexual assault on a minor are required to make restitution for the victim's medical or psychological treatment expenses. Pen C §1203.1g.
- Defendants convicted of the sexual assault on an elderly person are required to make restitution for the victim's medical or psychological treatment expenses. Pen C §1203.1j.

# (c) [§83.51] Lost Wages and Profits; Out-of-Pocket Expenses

Wages or profits lost by the victim as a result of the crime are a proper item of restitution. Pen C §1202.4(f)(3)(D)–(E); see, *e.g.*, *People v Ortiz* (1997) 53 CA4th 791, 798, 62 CR2d 66 (sales lost as result of counterfeited cassette tapes).

Restitution should include:

- Future lost wages. See *People v Fulton* (2003) 109 CA4th 876, 880 n2, 887, 135 CR2d 466 (lost wages associated with future postsurgery recovery).
- Profits or wages lost because of time spent as a witness. Pen C \$1202.4(f)(3)(E); People v Nguyen (1994) 23 CA4th 32, 42, 28 CR2d 140; see People v Ryan (1988) 203 CA3d 189, 192, 249 CR 750.
- Out-of-pocket expenses assisting the authorities in the investigation and prosecution of the case. Pen C §1202.4(f)(3)(E); People v Ortiz, supra, 53 CA4th at 797; see People v Rowland (1997) 51 CA4th 1745, 1749–1750, 60 CR2d 351.
- Wages or profits lost by the parents or guardian of a victim who is a minor. Pen C §§1202.4(f)(3)(D) (loss while caring for injured minor), 1202.4(f)(3)(E) (loss because of time spent as witness or assisting prosecution).

Lost wages include any commission income as well as any base wages. Commission income must be established by evidence of this income during the 12-month period before the date of the crime for which the court is ordering restitution, unless good cause for a shorter time period is shown. Pen C §1202.4(f)(3)(D)–(E).

#### **▶** JUDICIAL TIPS:

The monetary value of *time* that the victim expended as a result of the crime should be differentiated from *lost wages or profits*. Restitution for the former is permissible only to the extent that it reduced income or profits. See *People v Friscia* (1993) 18 CA4th 834, 837–838, 22 CR2d 656 (owners of preschool not entitled to

recover value of their time in preparing an accounting to determine amount of losses incurred by embezzling employee).

• If a victim is unable to go to work because of injuries inflicted by the defendant, and he or she used hours of sick leave in order to be paid, the victim should be reimbursed for the economic value of the hours of depletion of his or her accrued sick leave.

#### (d) [§83.52] Interest

The court must award interest on a restitution order under Pen C §1202.4 at the rate of 10 percent per year. Pen C §§1202.4(f)(3)(G), 1214.5. The court has the option of awarding interest from the date of sentencing or loss. Pen C §1202.4(f)(3)(G).

► JUDICIAL TIPS: The latter is most workable when there was a single loss. Many judges leave it to the probation officer or other county agency to factor interest into a payment schedule.

#### (e) [§83.53] Attorneys' Fees

Penal Code §1202.4(f)(3)(H) mandates restitution for actual and reasonable attorneys' fees "and other costs of collection accrued by a private entity on behalf of the victim." See *People v Maheshwari* (2003) 107 CA4th 1406, 1409–1411, 132 CR2d 903 (defendant convicted of embezzlement ordered to pay victim's attorneys' fees and private investigator fees incurred in civil action to determine the amount of and recover embezzled funds). Only those attorneys' fees attributable to the victim's recovery of economic damages are allowed under Pen C §1202.4(f)(3)(H). The victim, however, is entitled to full reimbursement for attorneys' fees incurred to recover both economic and noneconomic losses when the fees cannot be reasonably divided. *People v Fulton* (2003) 109 CA4th 876, 882–885, 135 CR2d 466 (case discusses procedure in determining proper amount of attorneys' fees as restitution).

A contingent fee paid by the victim to an attorney to pursue civil liability is recoverable under Pen C §1202.4(f)(3)(H). *People v Pinedo* (1998) 60 CA4th 1403, 1405–1406, 71 CR2d 151. Restitution is also proper for attorneys' fees incurred to prevent a dispersal of assets by defendant. *People v Lyon* (1996) 49 CA4th 1521, 57 CR2d 415. However, legal expenses related to opposing discovery in the criminal case are not allowable. *People v Lyon, supra*.

#### (f) [§83.54] Other Expenses

Relocation expenses. Adult victims have a right to restitution for expenses in relocating away from the defendant, including, but not limited

to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, and expenses for clothing and personal items. Pen C §1202.4(f)(3)(I). These expenses must be verified by law enforcement to be necessary for the victim's personal safety or by a mental health treatment provider to be necessary for the victim's emotional well-being. Pen C §1202.4(f)(3)(I). See *People v Mearns* (2002) 97 CA4th 493, 501–502, 118 CR2d 511 (court properly ordered relocation expenses to rape victim in the amount of difference between the sale price of the victim's original mobilehome where the rape occurred and the purchase price of a new one).

Residential security expenses. Penal Code §1202.4(f)(3)(J) mandates restitution for expenses to install or increase residential security related to any violent felony (as defined in Pen C §667.5(c)), including, but not limited to, a home security device or system, or replacing or increasing the number of locks.

Residence and/or vehicle retrofitting expenses. Penal Code §1202.4(f)(3)(K) requires restitution for expenses to retrofit a residence or vehicle, or both, to make the residence accessible to, or the vehicle operational by, the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime.

# (3) [§83.55] Matters That Do Not Affect Amount of Restitution

*Inability to pay.* See §83.42.

Victim's insurance. A victim is entitled to restitution regardless of whether the victim has submitted an insurance claim or has been partially or fully reimbursed by his or her insurer. *People v Birkett* (1999) 21 C4th 226, 245–247, 87 CR2d 205. The amount that a victim paid as a deductible under his or her insurance contract is not the measure of restitution. Rather, it is the full amount of loss, including the total amount that the victim's insurance company paid out plus the victim's deductible payments, and any other amounts not covered by the victim's insurance. See *In re* Brittany L. (2002) 99 CA4th 1381, 1386–1390, 122 CR2d 376. If the defendant's insurer, however, has made payments to the victim for losses subject to a Pen C §1202.4 restitution order, those payments must be offset against the defendant's restitution obligation. *People v Bernal* (2002) 101 CA4th 155, 165-168, 123 CR2d 622. But see People v Hamilton (2004) 114 CA4th 932, 941–943, 8 CR3d 190 (payments by insurer of defendant's parent to settle victim's civil action against both the defendant and parent may not offset defendant's restitution obligation when payments are made on parent's behalf and not directly on behalf of defendant).

Pending civil litigation by victim against defendant. A victim should not be penalized for pursuing a civil remedy. Restitution payments through the probation department or other appropriate agency should minimize any risk of double recovery.

Bankruptcy. See §83.32.

Third party rights. Third party indemnification or subrogation rights do not affect the amount of restitution that is to be ordered. Pen C §1202.4(f)(2); People v Hove (1999) 76 CA4th 1266, 1272–1273, 91 CR2d 128 (court properly ordered restitution in full amount of medical expenses even though victim had not incurred any actual economic losses because of coverage by Medicare and/or Medi-Cal benefits).

Victim's release of liability. A victim's release of liability to the defendant's insurance company as part of a settlement does not release the defendant from his or her restitution obligation. A release cannot waive the People's right to have a defendant pay restitution ordered as part of the sentence. The victim would be in an untenable position if he or she had to reject a settlement offer from the defendant's insurance company that covers only a portion of the victim's losses in order to preserve the uncertain possibility that the full amount might be recovered. People v Bernal, supra, 101 CA4th at 160–161.

Prison sentence. See §83.66.

#### (4) [§83.56] Waiver of Full Restitution

The court's authority to waive full restitution is circumscribed in the same manner as authority to waive the restitution fine. The court may do so only if it finds compelling and extraordinary reasons for not ordering full restitution and states these reasons on the record. Pen C §1202.4(f). When the court waives the fine, it must order the defendant to perform community service as a condition of probation, unless the court finds and states on the record compelling and extraordinary reasons for not doing so. Pen C §1202.4(n).

#### **►** JUDICIAL TIPS:

- Reasons for not ordering community service should be stated separately and in addition to the reasons for not ordering full restitution.
- In the event probation is revoked, the court needs to replace the community service order with an order to pay restitution. Pen C §1202.4(n). The statute contains no grounds that would excuse making such an order to pay.

#### g. Order

#### (1) [§83.57] Specificity and Form

Specificity. The court's restitution order must be specific and detailed, identifying each victim and each loss to the extent possible. Pen C §1202.4(f)(3); see *People v Blankenship* (1989) 213 CA3d 992, 998, 262 CR 141. An order for restitution is unenforceable if it does not specify the losses to which it pertains. *People v Guardado* (1995) 40 CA4th 757, 762–763, 47 CR2d 81. Because a restitution order is enforceable by the victim as if it were a civil judgment (see §83.33), it must have the same degree of specificity as a civil judgment. 40 CA4th at 762. For discussion of procedure when the amount of restitution is uncertain at the time of sentencing, see §83.58.

► JUDICIAL TIP: Courts are encouraged to use Judicial Council form CR-110/JV-790 when making restitution orders. For form, see §83.84.

Separate form. Many judges issue a separate copy of the restitution order for each victim because victims often need a certified copy of the order for enforcement purposes and are entitled to one on request. Pen C §1214(b); see discussion in §83.33. The California Victim Compensation and Government Claims Board is also entitled to a copy on request. Pen C §1214(b). Penal Code §1202.4(f)(3) also seems to contemplate separate orders.

*Notice to Board*. The court clerk must notify the California Victim Compensation and Government Claims Board within 90 days of the court's imposition of a restitution order if the defendant is ordered to pay restitution to the Board because of the victim receiving compensation from the Restitution Fund. Pen C §1202.4(p).

#### (2) [§83.58] Amount Initially Uncertain

At the time of sentencing, the amount of restitution often cannot be fixed because necessary information is lacking or a subsequent hearing is needed to resolve a dispute about the amount. In these situations the court may order that it will determine the amount later. Pen C §1202.4(f); See *People v Amin* (2000) 85 CA4th 58, 62, 101 CR2d 756 (as part of plea bargain defendant agreed to pay restitution, and decision on amount reserved by court for later hearing). The court retains jurisdiction over the defendant for purposes of imposing or modifying restitution until the losses are determined. Pen C §1202.46.

► JUDICIAL TIP: Judges often seek a waiver of defendant's presence at the future restitution hearing. This is particularly useful when the defendant is sentenced to prison. For judicial economy,

judges will often set the date for the restitution hearing at the time of sentencing.

#### (3) [§83.59] Delegating Restitution Determination

General rule. The court may not delegate to the probation officer the duty to determine the amount of restitution. People v Cervantes (1984) 154 CA3d 353, 358, 201 CR 187; see Pen C §1202.4(f) (court shall require restitution in amount to be established by court order). But see People v Lunsford (1998) 67 CA4th 901, 79 CR2d 363 (restitution order directing county agency to determine amount at later time enforceable). As to minors, see In re Karen A. (2004) 115 CA4th 504, 507–511, 9 CR3d 369, which holds that Welf & I C §730.6(h) allows the juvenile court to delegate to the probation officer the tasks of identifying losses and specifying the amount of restitution. Minors are entitled to a court hearing to dispute the probation officer's determination of the restitution amount. Welf & I C §730.6(h).

Delegation with consent. The court with the defendant's consent may order the probation officer to set the amount of restitution. Pen C §1203.1k; see *People v DiMora* (1992) 10 CA4th 1545, 1549, 13 CR2d 616. The defendant can contest the probation officer's determination in court. Pen C §1203.1k.

Delegation when amount uncertain at sentencing. When the extent of a victim's loss cannot be ascertained at the time of sentencing, People v Lunsford, supra, permits the court to order the defendant to pay restitution in an amount to be determined by the local agency that administers the victim restitution program; the defendant has a right to a court hearing in accordance with Pen C §1202.4(f)(1).

#### **►** JUDICIAL TIPS:

- Most judges seek defendant's consent or proceed as discussed in §83.58.
- The California Department of Corrections (CDC) is not authorized to initiate collection of restitution based on determinations by probation officers or other county agencies. CDC must have a signed, sealed, and certified court order reflecting specific amounts and names of victims.

Setting payment schedule. Courts often delegate the task of setting up the defendant's payment schedule to the probation department or another county agency. See *People v Ryan* (1988) 203 CA3d 189, 198, 249 CR 750. Payment schedules are not necessary for adults committed to the CDC or youthful offenders committed to the California Youth Authority (CYA). Under statute, a specified percentage will be deducted from prison

wages and trust account deposits. Pen C §2085.5; Welf & I C §§1752.81–1752.82.

► JUDICIAL TIP: The defendant should be given an opportunity to challenge the determination.

Relying on probation report. The court may rely on the probation report in setting the amount of restitution. People v Campbell (1994) 21 CA4th 825, 830–832, 26 CR2d 433; People v Foster (1993) 14 CA4th 939, 946, 18 CR2d 1; see §83.40.

#### (4) [§83.60] Relation of Restitution Order to Probation

Penal Code §1202.4 applies whether or not the court grants probation. Pen C §1202.4(a)(1), (f).

JUDICIAL TIP: When defendant is being sentenced to prison, an order for full restitution is as mandatory as in cases of probation.

When the court grants probation, payment of restitution must be made a condition of probation. Pen C §1202.4(m)–(n). Termination of probation does not affect the victim's right to enforce the order. Pen C §1202.4(m).

► JUDICIAL TIP: When probation is revoked or terminated, and the defendant is sentenced to CDC, the initial order reflecting the restitution must be included in the legal documents accompanying the inmate to CDC. In order for the restitution to continue to be collected, the victim must submit a request to CDC.

The court may revoke a defendant's probation based on the defendant's willful failure to pay restitution when the defendant has the ability to do so. Pen C §1203.2(a); *People v Lawson* (1999) 69 CA4th 29, 81 CR2d 283.

If the defendant is unable to pay full restitution within the initial term of probation, the court may modify and extend the period of probation to allow the defendant to pay off all restitution within the probation term. Pen C §1203.3(b)(4); *People v Cookson* (1991) 54 C3d 1091, 1097, 2 CR2d 176. Generally, the probation term may be extended up to but not beyond the maximum probation period allowed for the offense. *People v Medeiros* (1994) 25 CA4th 1260, 1267–1268, 31 CR2d 83. However, Pen C §1203.2(e) provides an exception, allowing probation to be extended past the maximum period if probation is revoked based on a violation of probation and the revocation has been set aside. *In re Hamm* (1982) 133 CA3d 60, 67, 183 CR 626; *People v Carter* (1965) 233 CA2d 260, 268, 43 CR 440.

A defendant is not entitled to have his or her conviction expunged under Pen C §1203.4 following termination of the defendant's probation when the defendant has not paid the full amount of the restitution. For purposes of Pen C §1203.4, a defendant has not fulfilled a restitution condition of probation unless the defendant has made all court-ordered payments for the entire period of probation and has paid the obligation in full. *People v Covington* (2000) 82 CA4th 1263, 1271, 98 CR2d 852.

### (5) [§83.61] Relation of Restitution Order to Restitution Fund

Victims of criminal acts may recover compensation from the state Restitution Fund under specified circumstances; the Fund is administered by the California Victim Compensation and Government Claims Board. Govt C §§13950–13969.7.

A restitution order does not preclude a victim's right to financial assistance from the Fund, but the amount of such assistance is reduced by the amount the victim actually receives for the same loss under the restitution order. Pen C §1202.4(j).

Restitution payments are made to the Fund to the extent that it provided compensation to the victim. Pen C §1202.4(f)(2). More broadly, when the Fund pays a victim, it is subrogated to the victim's rights against persons liable for restitution. Pen C §1202.4(f)(2); Govt C §13963(a).

Assistance from the Fund as a result of the defendant's conduct is presumed to be a direct result of the defendant's crime and must be included in the amount of restitution ordered by the court. Pen C  $\S1202.4(f)(4)(A)$ . The amount of assistance provided by the Fund may be established by copies of bills submitted to the Board reflecting the amount paid by the Board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Pen C §1202.4(f)(4)(B). Certified copies of these bills provided by the Board and redacted to protect the victim's privacy and safety or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that the bills were submitted to and paid by the Board, are sufficient to meet this requirement. Pen C §1202.4(f)(4)(B); see *People v Cain* (2000) 82 CA4th 81, 87–88, 97 CR2d 836 (Board's statement of claims paid on victim's behalf is inherently reliable document). If the defendant offers evidence to rebut this presumption, the court may release additional information contained in the Board's records to the defendant only after (1) reviewing the information in camera, and (2) finding that the information is necessary for the defendant to dispute the amount of the restitution order. Pen C  $\S1202.4(f)(4)(C)$ .

#### (6) [§83.62] Order Imposing Joint and Several Liability

A restitution order under Pen C §1202.4 may require codefendants to pay restitution jointly and severally. *People v Blackburn* (1999) 72 CA4th 1520, 1535, 86 CR2d 134; *People v Madrana* (1997) 55 CA4th 1044, 1049, 64 CR2d 518. Courts frequently make such orders. Under such an order, each defendant is entitled to a credit for any actual payments made by the other. *People v Blackburn, supra,* 72 CA4th at 1535. But a defendant cannot be jointly and severally liable with a codefendant for restitution if the defendant did not participate in the crime causing the victim's loss. See *People v Leon* (2004) 124 CA4th 620, 21 CR3d 394 (defendant convicted of passing one forged check for \$2450, and codefendant convicted of passing three forged checks totaling \$11,000; trial court erred in ordering defendant to pay victim restitution of \$13,450 jointly and severally with codefendant).

As to joint and several liability of the parents or guardians of a juvenile offender, see §83.70.

### (7) [§83.63] Correction, Modification, and Amendment of Restitution Orders

Correcting failure to order restitution. A sentence without a restitution award to a victim within Pen C §1202.4 (or an alternative statement of extraordinary reasons) is invalid; the trial court may properly add a restitution order later. Pen C §1202.46; People v Rowland (1997) 51 CA4th 1745, 1750–1752, 60 CR2d 351. See also People v Moreno (2003) 108 CA4th 1, 132 CR2d 918 (correction of sentence under Pen C §1202.46 not limited to situations where restitution amount is not ascertainable at the time of sentencing).

Modification. Penal Code §1202.4(f)(1) authorizes courts to modify restitution on motion of the prosecutor, victim, defendant, or court. See also Pen C §1203.2(b) (modification of probation). Penal Code §1203.3(b)(4) provides that when the defendant is on probation, the court may not modify the dollar amount of restitution obligations because of the defendant's good conduct and reform absent compelling and extraordinary reasons. Penal Code §1203.3(b)(5) additionally provides that nothing in Pen C §1203.3 prohibits the court from modifying the dollar amount of a restitution order under Pen C §1202.4(f) at any time during the term of the probation. Both the prosecutor and the victim have a right to notice and a hearing before a restitution order may be modified or terminated. Pen C §8679.02(a)(3), 1191.1, 1202.4(f)(1); 1203.3(b)(1). See Melissa J. v Superior Court (1987) 190 CA3d 476, 237 CR 5 (court set aside termination of restitution order made without notice to the victim or an opportunity for the victim to object). For modification of probation generally, see

3 Witkin and Epstein, California Criminal Law, *Punishment* §§573–576 (3d ed 2000).

#### **►** JUDICIAL TIPS:

- Many judges read Pen C §§1202.4(f)(1), (g), and 1203.3(b)(4) as prohibiting a modification that orders less than full restitution absent compelling and extraordinary reasons whenever payment of restitution is a condition of probation.
- When the court revokes probation and commits defendant to prison, it should modify the original judgment by ordering defendant to pay restitution because the probation condition that requires such payment no longer exists. See *People v Young* (1995) 38 CA4th 560, 567, 45 CR2d 177. Some judges believe that this is unnecessary because in their view a restitution obligation, like a restitution fine, survives a revocation of probation. See *People v Arata* (2004) 118 CA4th 195, 201–203, 12 CR3d 757; *People v Chambers* (1998) 65 CA4th 819, 821–823, 76 CR2d 732; Pen C §1202.4(m) (restitution unpaid, when defendant no longer on probation, enforceable like a civil judgment).

#### h. Enforcement

#### (1) [§83.64] Income Deduction Orders

On entry of a restitution order under Pen C §1202.4, the court must enter a separate order for income deduction on determination of the defendant's ability to pay, regardless of probation status, in accordance with Pen C §1203. Pen C §1202.42(a). The court may consider future earning capacity when determining the defendant's ability to pay. The defendant bears the burden of demonstrating an inability to pay. Pen C §1202.42(a). Express findings by the court as to the factors bearing on the amount of the deduction are not required. Pen C §1202.42(a).

The order is stayed as long as defendant pays restitution. Pen C §1202.42(b)(1). Penal Code §1202.42 includes detailed provisions for enforcing the order by service on defendant's employer if defendant fails to meet the restitution obligation. Defendant has a right to notice and a hearing before the income deduction order is enforced. Pen C §1202.42(b)(2), (f).

By its terms, Pen C §1202.42 applies only to restitution orders made under Pen C §1202.4 or its predecessors.

► JUDICIAL TIP: The court should *not* consider making an income deduction order in the following situations:

- A restitution order directed to a juvenile offender under Welf & I C §730.6.
- An order to pay restitution for losses from conduct other than the commission of a crime of which defendant was convicted. See §§83.72–83.80.

County retirement benefits exemption. The court may not order a county retirement system to deduct restitution payments from a disability allowance owed to a defendant who is a retired county employee. Government Code §31452 provides an exemption from execution or other court process for benefits under county retirement systems. Board of Retirement v Superior Court (2002) 101 CA4th 1062, 124 CR2d 850 (court found that neither Proposition 8 nor former Govt C §13967.2 (recast as Pen C §1202.42) has impliedly repealed the exemption).

See the Judicial Council income deduction form and related forms in §§83.86–83.89.

# (2) [§83.65] Order To Apply Specified Portion of Income to Restitution

In two situations the court must order probationers to seek and maintain employment and apply a portion of earnings specified by the court to make restitution for the victim's medical and psychological treatment expenses:

- (1) Conviction of sexual assault on a minor. Pen C §1203.1g.
- (2) Conviction of assault, battery, or assault with a deadly weapon on a senior. Pen C §1203.1j.

In all cases of probation, the court may require as a condition of probation that the probationer go to work and earn money to pay any reparation condition and apply those earnings as directed by the court. Pen C §1203.1(d).

#### (3) [§83.66] Collection of Restitution by CDC and CYA

The California Department of Corrections (CDC) and the California Youth Authority (CYA) collect restitution from the funds of inmates and wards in the same manner as restitution fines. Pen C §2085.5; Welf & I C §§730.6(p), 1752.81; for discussion, see §83.23. Victim restitution is collected before the restitution fine. Pen C §2085.5(g); Welf & I C §§730.6(p), 1752.81(f).

#### **►** JUDICIAL TIPS:

- Courts should make sure that the CDC and the CYA are given restitution information that includes specific amounts and names of victims.
- Courts should not direct the correctional institutions to collect restitution; their obligation to do so rests on statute, not court order.
- Courts should advise victims with verified orders of restitution that
  in order for the CDC to collect restitution on their behalf, they
  must first file a Request for Victim Services and Restitution Collection Form CDC 1707 with the CDC. The form is available from
  the CDC Office of Victim Services and Restitution Web site
  (www.corr.ca.gov/victimservices/1707/victim\_form.pdf) or by
  calling 888-562-5874.

#### (4) [§83.67] Restitution Centers

The Director of Corrections may establish and operate restitution centers, which are facilities that house nonviolent defendants who are required to work outside the facilities during the day to pay off restitution owing to their victims. Pen C §§6220–6236. Of the wages earned by a defendant while housed at a restitution center, one-third is given to the victim, one-third to the Department of Corrections to pay for the operation costs of the center, and one-third to the defendant's savings account. Pen C §6231. To participate in the restitution center, defendants must be employable, provide no risk to the community, and have no prior convictions of crimes involving violence, sex, or the sale of narcotics. See Pen C §6228 for discussion of eligibility requirements.

At present, only the Los Angeles County Department of Corrections operates a restitution center.

► JUDICIAL TIP: Defendants from any county may be placed in the Los Angeles Restitution Center. This is a very good alternative for those defendants convicted of white collar crime. But it is very important that the sentencing order specify placement in the Restitution Center. See Pen C §6227 (court may order Department of Corrections to place eligible defendant in center).

#### (5) [§83.68] Financial Disclosure

A restitution order under Pen C §1202.4 subjects the defendant to detailed financial disclosure requirements in aid of enforcement. Pen C §1202.4(f)(5)–(11).

The defendant must disclose all assets, income, and liabilities in which the defendant held or controlled a present or future interest as of the

date of the defendant's arrest. Pen C §1202.4(f)(5). See the Judicial Council asset disclosure form CR-115 in §83.85). The disclosure must be filed with the clerk of the court no later than the defendant's sentencing date unless otherwise directed by the court under Pen C §1202.4(f)(8). Pen C §1202.4(f)(7).

The court may consider a defendant's unreasonable failure to make a complete disclosure as (1) a circumstance in aggravation of the crime in imposing a term under Pen C §1170(b), or (2) a factor indicating that the interests of justice would not be served by admitting the defendant to probation, by conditionally sentencing the defendant, or by imposing less than the maximum fine and sentence fixed by law for the case. Pen C §1202.4(f)(9). A defendant's failure or refusal to file a disclosure statement does not delay the entry of an order of restitution or pronouncement of sentence. Pen C §1202.4(f)(10). A defendant who willfully states as true on the disclosure any material matter that the defendant knows to be false is guilty of a misdemeanor, unless this conduct is punishable as perjury or another provision of law provides for a greater penalty. Pen C §1202.4(f)(5), (11).

Financial information filed by the defendant under Pen C §987(c) to help the court determine the defendant's ability to employ counsel may be used instead of the required financial disclosure when the defendant fails to file the disclosure. Pen C §1202.4(f)(6). In such an event, the defendant shall be deemed to have waived confidentiality of the information. Pen C §1202.4(f)(6).

Filing of updated financial disclosure. If a defendant has a remaining unpaid balance on a restitution order or fine 120 days before the defendant's scheduled release from probation or completion of a conditional sentence, the defendant must prepare and file a new and updated financial disclosure identifying all assets, income, and liabilities. Pen C §1202.4(f)(11). The defendant must file this updated financial disclosure with the court clerk no later than 90 days before the defendant's scheduled release from probation or completion of the defendant's conditional sentence. Pen C §1202.4(f)(11).

*Use of interrogatories*. A crime victim who has not received complete payment of restitution may serve Judicial Council Form CR–200 interrogatories on the defendant once a year to discover information about the defendant's assets, income, and liabilities. CCP §2033.5(e) (renumbered CCP §2033.720(b) eff. July 1, 2005).

For enforcement of restitution orders as civil judgments, see §83.33.

### (6) [§83.69] Applying Seized Assets to Restitution

An order for payment of restitution may be satisfied in part or in whole through assets seized from the defendant. *People v Nystrom* (1992)

7 CA4th 1177, 10 CR2d 94; *People v Chabeear* (1984) 163 CA3d 153, 209 CR 218. Before the court may release seized assets to a victim, it must afford the defendant notice and opportunity to be heard in opposition to the victim's claim. 163 CA3d at 155 (due process violation to deny defendant to challenge robbery victim's claim of money seized during search of defendant's residence). However, in *Nystrom*, the court held, in contrast to *Chabeear*, that a defendant was not entitled to notice and hearing before money seized at the time of arrest was released to the victim because the trial court had already entered a valid restitution order as part of a negotiated plea. 7 CA4th at 1181–1182.

#### i. [§83.70] Juvenile Offenders

Juvenile restitution law under Welf & I C §730.6 parallels Pen C §1202.4. The more extensive case law on adult restitution can therefore be used by a juvenile court for guidance on most restitution issues. See *In re Johnny M.* (2002) 100 CA4th 1128, 1132–1133, 123 CR2d 316. Although there is a substantial similarity between juvenile and adult restitution law, there are the following exceptions:

- Ability to pay. For minors, as for adults, ability to pay is not a consideration in making restitution orders (Welf & I C §730.6(h)), subject to an exception in Welf & I C §742.16 (when minor is unable to repair damage caused by vandalism or graffiti offense, order for monetary restitution depends on ability to pay).
- Liability of parents. Parents and guardians with joint or sole legal and physical custody and control of the minor are rebuttably presumed to be jointly and severally liable for a minor's restitution obligation. Welf & I C §730.7(a). The amount of their liability is limited by statute and is subject to the court's consideration of their inability to pay. Welf & I C §730.7(a); CC §§1714.1, 1714.3. The parents or guardians have the burden of showing inability to pay and the burden of showing by a preponderance of the evidence that they were either not given notice of potential liability for payment of restitution before the wardship petition was sustained or that they were not present during the proceedings when the petition was sustained and during any subsequent hearing addressing restitution. Welf & I C §730.7(a)
- Economic losses. Penal Code §1202.4(f)(3) includes interest, attorneys' fees, and collection costs in the definition of economic losses; Welf & I C §730.6 does not.
- Financial disclosure. Welfare and Institutions Code §730.6 does not impose financial disclosure requirements on juvenile offenders.

- Wage deduction order. Juvenile offenders are not subject to such orders. See Pen C §1202.42.
- *Identification of victims*. The restitution order, to the extent possible, must identify each victim, unless the court for good cause finds that the order should not identify the victim(s). Welf & I C §730.6(h).
- Retention of jurisdiction to determine restitution amount. If the amount of restitution cannot be ascertained at the time of sentencing, the court retains jurisdiction to determine restitution only during the minor's term of commitment or probation. Welf & I C §730.6(h).

### j. [§83.71] Remand for Resentencing

A restitution order may be increased or imposed for the first time after a remand for resentencing following the defendant's partially successful appeal. *People v Harvest* (2000) 84 CA4th 641, 646–650, 101 CR2d 135 (no double jeopardy bar because victim restitution is civil remedy).

Restitution fines may *not* be increased after remand for resentencing following a successful appeal. See §83.19.

#### 4. Discretionary Restitution

#### a. Dismissed and Uncharged Counts: Harvey Waivers

#### (1) [§83.72] General Principles

The court may order restitution on dismissed counts when the negotiated disposition includes a *Harvey* waiver. Pen C §1192.3. See, *e.g.*, *People v Campbell* (1994) 21 CA4th 825, 26 CR2d 433; *People v Beck* (1993) 17 CA4th 209, 21 CR2d 250. *Harvey* waivers derive their name from *People v Harvey* (1979) 25 C3d 754, 758, 159 CR 696 (defendant to suffer no adverse sentencing consequences from dismissed count in absence of contrary agreement); see *People v Dalvito* (1997) 56 CA4th 557, 559 n2, 65 CR2d 679; *People v Moser* (1996) 50 CA4th 130, 132, 57 CR2d 647.

The waiver may also encompass unfiled charges; when it does, the court may base a restitution order on defendant's uncharged offenses. See, e.g., People v Goulart (1990) 224 CA3d 71, 273 CR 477; People v Baumann (1985) 176 CA3d 67, 222 CR 32.

The *Harvey* waiver suffices; the plea agreement need not specifically refer to restitution on dismissed counts. *People v Campbell, supra.* 

#### (2) [§83.73] Burden of Proof

The prosecution has the burden of proving defendant's culpability for uncharged or dismissed offenses by a preponderance of the evidence when the defendant denies having committed them. *People v Baumann* (1985) 176 CA3d 67, 80, 222 CR 32.

► JUDICIAL TIP: Disputes concerning this culpability can be avoided by having the plea agreement pinpoint the matters on which the court may order restitution. See, *e.g.*, *People v Moser* (1996) 50 CA4th 130, 133, 57 CR2d 647.

For the amount of restitution, the rule is the same as for orders under Pen C §1202.4: defendant has the task of showing that the recommendation of the probation officer or the figures of the victims are inaccurate. *People v Baumann, supra*; see §83.41.

#### (3) [§83.74] Relation to Probation

The court may probably make a valid restitution order under a *Harvey* waiver even when it does not place defendant on probation. See *People v Beck* (1993) 17 CA4th 209, 21 CR2d 250 (defendant sentenced to prison); but see *People v Carbajal* (1995) 10 C4th 1114, 1120–1123, 43 CR2d 681 (dicta that authority to order restitution in situations not covered by Pen C §1202.4 derives from court's discretion to impose probation conditions).

#### (4) [§83.75] Ability To Pay

A defendant who claims inability to pay restitution for losses covered by a *Harvey* waiver is entitled to a judicial determination of ability to pay. *People v Campbell* (1994) 21 CA4th 825, 830–832, 26 CR2d 433; see *People v Baumann* (1985) 176 CA3d 67, 80, 222 CR 32 (due process satisfied by providing hearing on ability to pay and amount of loss). The court need not make express findings on ability to pay. *People v Campbell, supra*.

Restitution orders under Pen C §1202.4 are subject to different rules. See §83.42.

#### b. [§83.76] Court's Discretion Under Pen C §1203.1

The court has broad discretion to order restitution as a condition of probation consistent with the ends of fostering rehabilitation and protecting public safety. Pen C §1203.1(a)(3), (j); *People v Carbajal* (1995) 10 C4th 1114, 1120, 43 CR2d 681. Under Pen C §1203.1(j), the court can order restitution when the losses are not the result of the crime underlying the defendant's conviction. However, the restitution condition must be

reasonably related either to the crime of which the defendant was convicted or to the goal of deterring future criminality. 10 C4th at 1121–1124. In *People v Rugamas* (2001) 93 CA4th 518, 521, 113 CR2d 271, the court upheld, as a condition of probation, restitution for the cost of medical treatment received by the defendant and paid for by the police department, and administered as a result of injuries sustained by the defendant when the police shot him with rubber bullets. Even though the police department was not a victim entitled to restitution under the mandatory restitution provisions of Pen C §1202.4, the restitution order was proper under Pen C §1203.1. The restitution was reasonably related to both the crime of which the defendant was convicted (brandishing weapon to avoid arrest) and the goal of deterring future criminality.

A similar provision to Pen C §1203.1j is found in Welf & I C §730(b). It states that when a ward is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, the court may make any and all reasonable orders for the conduct of the ward, including the imposition of any reasonable conditions that it may determine fitting and proper to the ends that justice may be done and the reformation and rehabilitation of the ward enhanced.

### c. [§83.77] Accidents Related to Hit-and-Run or DUI Offenses

Conviction of a misdemeanor hit-and-run or DUI offense does not establish responsibility for the accident in which defendant was involved. See *People v Braz* (1998) 65 CA4th 425, 432, 76 CR2d 531 (in a hit-and-run case the crime is the running, not the hitting). However, even though the crime did not cause the loss, the court may order restitution as a condition of probation, at least when "there is no question as to defendant's responsibility for the loss." *People v Carbajal* (1995) 10 C4th 1114, 1124, 43 CR2d 681 (defendant conceded liability in hit-and-run accident); *People v Kleinman* (2004) 123 CA4th 1476, 1479–1481, 20 CR3d 885 (hit-and-run); *People v Phillips* (1985) 168 CA3d 642, 650, 214 CR 417 (DUI).

Restitution is appropriate in these cases because it is reasonably related to the crime of which defendant was convicted and to the goal of probation to deter future criminality. *People v Carbajal, supra,* 10 C4th at 1123. It is particularly important for the court to

- Notify defendant that the court may consider requiring restitution as a condition of probation; and
- Give defendant "a meaningful opportunity to controvert the information" that the court considers. 10 C4th at 1125.

For ability to pay, see §83.75.

#### **►** JUDICIAL TIPS:

- In the absence of a plea agreement, restitution in a *misdemeanor* hit-and-run or DUI case should probably be ordered only when it is obvious or undisputed that defendant caused the accident.
- Convictions of *felony* hit-and-run or DUI causing injury (Veh C §§20001, 23153) pose no causation problems and should be handled as mandatory restitution cases. See *People v Pinedo* (1998) 60 CA4th 1403, 71 CR2d 151.

#### d. [§83.78] License Violations

A defendant convicted of driving with a suspended license may not be ordered to pay restitution for an accident. *People v Taylor* (1986) 179 CA3d Supp 1, 225 CR 430.

#### **►** JUDICIAL TIPS:

- Many judges believe that *Taylor* has been superseded by *People v Carbajal* (1995) 10 C4th 1114, 43 CR2d 681, discussed in §83.77.
   See also *People v Hays* (1991) 234 CA3d Supp 22, 286 CR 462 (conviction of acting as unlicensed contractor justifies restitution order if victim entered contract on assumption that defendant had license).
- A restitution order based on a conviction of driving with a suspended or revoked license should be made, if at all, only when the defendant does not dispute responsibility for the accident. See *People v Carbajal, supra*.

#### e. [§83.79] Receiving Stolen Property

A receiving conviction does not by itself permit a conclusion that the defendant was responsible for the underlying theft; such a conviction is not a basis for ordering restitution to the theft victim. *People v Scroggins* (1987) 191 CA3d 502, 506, 236 CR 569; *In re Maxwell C.* (1984) 159 CA3d 263, 266, 205 CR 310.

In contrast, there is a sufficient connection between a conviction for vehicle theft and loss of personal property that had been in the car to justify a restitution order covering the lost personal property. *People v Vournazos* (1988) 198 CA3d 948, 955–956, 244 CR 82.

#### f. [§83.80] Support Payments to Victims' Children

A defendant may be ordered to make monthly payments to the children of a manslaughter victim under Pen C §1203.1. *People v Clark* (1982) 130 CA3d 371, 384, 181 CR 682. See also *People v Harvest* 

(2000) 84 CA4th 641, 652–653, 101 CR2d 135 (defendant ordered to pay child support for murder victim's children). The court can also order restitution to the Restitution Fund for support to widows and children paid by the Fund. See Govt C §13957.5(a)(4).

#### 5. [§83.81] Restitution in Bad Check Diversion Cases

In counties with a bad check diversion program, the district attorney may enter an agreement with the offender not to prosecute on the condition, inter alia, of full restitution to the victim of the bad check. Pen C \$1001.64.

#### IV. SCRIPT AND FORMS

### A. [§83.82] Sample Script: Admonition Concerning Restitution Fine

#### Misdemeanor case:

Do you understand that in this case the court must impose a restitution fine of at least \$100 and no more than \$1000? Do you further understand that if you are granted probation, the sentencing judge will also impose an additional probation revocation restitution fine in the same amount, but this fine will be suspended unless your probation is revoked? If probation is revoked, the fine will be reinstated against you. Do you have any questions regarding these restitution fines?

#### Felony case:

Do you understand that in this case the court must impose a restitution fine of at least \$200 and no more than \$10,000? Do you further understand that if you are granted probation or sentenced to state prison, in addition to the restitution fine the court determines to be appropriate in your case, the court must impose an additional fine in the same amount? This additional fine will be suspended and not imposed unless [probation is revoked/after being paroled, your parole is revoked]. Do you have any questions regarding these restitution fines?

# B. [§83.83] Sample Written Form: Admonition Concerning Restitution Fine and Restitution

#### **Misdemeanor case:**

I understand that I must pay a restitution fine of no less than \$100 and up to \$1000. If I am placed on probation, the court will impose an additional probation revocation restitution fine in the same amount that will be collected only if my probation is revoked. I also understand that I must pay full restitution to all victims for any losses suffered as a result of the crime(s).

Initials

#### Felony case:

I understand that I must pay a restitution fine of no less than \$200 and up to \$10,000. If I am placed on probation, the court will impose an additional probation revocation restitution fine in the same amount that will be collected only if my probation is revoked. If I am sentenced to state prison, the court will impose an additional parole revocation restitution fine in the same amount that will be collected only if my parole is revoked. I also understand that I must pay full restitution to all victims for any losses suffered as a result of the crime(s).

Initials

### C. [§83.84] Judicial Council Form: Order for Restitution and **Abstract of Judgment**

ATTORNEY OR PERSON WITHOUT ATTORNEY (Name, state bar number, and address):		
Recording requested by and return to:		
TELEPHONE NO.: FAX NO. (Optional):		
E-MAIL ADDRESS (Optional):		
ATTORNEY FOR JUDGMENT ASSIGNEE OF RECORD		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		FOR RECORDER'S USE ONLY
MAILING ADDRESS:	CASE NUMBER:	
CITY AND ZIP CODE:	CASE NOWIDER.	
BRANCH NAME:		<u> </u>
CASE NAME:		FOR COURT USE ONLY
ODDED FOR DESTITUTION AND ADSTRACT OF HIS	CMENT	
ORDER FOR RESTITUTION AND ABSTRACT OF JUL (Penal Code, §§ 1202.4(f), 1203.1(l), 1214;	GWENT	
Welfare and Institutions Code, § 730.6(h) and (i))		
ORDER FOR RESTITUTION		
1. a. On (date): defendant (name,	):	
was convicted of a crime that entitles the victim to resti	tution.	
b. On (date): child (name):		
was found to be a person described in Welfare and Ins section 602, which entitles the victim to restitution. terminated.	titutions Code Wardship is	
c. Parents or guardians jointly and severally liable (name	each):	
d. Co-offenders found jointly and severally liable (name ex	•	
Evidence was presented that the victim named below suffered losses defendant's/child's conduct. Defendant/child was informed of his or h		
determination of the amount of restitution and	or right to a judicial	
	e amount of restitution	to be ordered. c. waived a hearing.
3. THE COURT ORDERS defendant/child to pay restitution to		
a. the victim (name):	in the	amount of: \$
b. the State Victim Compensation Board, to reimburse payn	nents to the victim from	the Restitution Fund, in the amount of: \$
c. plus interest at 10 percent per year from the date of	loss	or sentencing
d. plus attorney fees and collection costs in the sum of \$		
e.  plus an administrative fee at 10 percent of the restitution	owed (Pen. Code, § 12	03.1(/))
4. The amount of restitution includes		
a. value of property stolen or damaged b.	medical expenses	
c. lost wages or profits		
(1) incurred by victim due to injury (2) of victim's parent(s) or guardian(s) (if victim is a chile	d) incurred while caring	for the injured child
(3) incurred by victim due to time spent as a witness or		•
(4) of victim's parent(s) or guardian(s) (if victim is a prosecution	child) due to time s	pent as a witness or in assisting police or
d. noneconomic losses (felony violations of Pen. Code, § 28	88 only)	
e other (specify): Date:		
		JUDICIAL OFFICER

VICTIM TO RECEIVE CERTIFIED COPY FOR FILING WITH COUNTY RECORDER

CASE NAME:	CASE NUMBER		
NOTICE TO VICTIMS  PENAL CODE SECTION 1214 PROVIDES THAT ONCE A DOLLAR AMOUNT OF RESTITUTION HAS BEEN ORDERED, THE ORDER IS THEN ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT. ALTHOUGH THE CLERK OF THE COURT IS NOT ALLOWED TO GIVE LEGAL ADVICE, YOU ARE ENTITLED TO ALL RESOURCES AVAILABLE UNDER THE LAW TO OBTAIN OTHER INFORMATION TO ASSIST IN ENFORCING THE ORDER.  THIS ORDER DOES NOT EXPIRE UNDER PENAL CODE SECTION 1214(d).  THE VICTIM SHALL FILE A SATISFACTION OF JUDGMENT WITH THE COURT WHENEVER AN ORDER TO PAY RESTITUTION IS SATISFIED, PURSUANT TO PENAL CODE SECTION 1214(d).			
APPLICATION FOR ABSTRACT OF JUIC  5. The judgment creditor assignee of record applies for an abstract of judgment and represents the following:  a. Judgment's debtor's Name and last known address  b Driver's license no. and state:  c Social security no.:  d Driver's license no.	other (specify):  Unknown Unknown		
Date of birth:  Date:  (TYPE OR PRINT NAME)	(SIGNATURE OF APPLICANT OR ATORNEY)  ON INFORMATION AND BELIEF		
ABSTRACT OF JUDGMENT			
6. I certify that the following is a true and correct judgment entered in this action.  7. Judgment creditor (name):  whose address or whose attorney's address appears on this form above the court's name.	[SEAL]		
<ul> <li>8. Judgment debtor (full name as it appears in judgment):</li> <li>9. Judgment entered on (date):</li> <li>10. Total amount of judgment as entered or last renewed: \$</li> </ul>			
11. A stay of enforcement was ordered on and is effective until A stay of enforcement was not ordered.  This abstract of judgment issued on (date):			
Clark by	Deputy		

#### NOTICE TO COUNTY RECORDER

THIS ORDER IS ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT, PURSUANT TO PENAL CODE SECTION 1202.4(I) AND (m), PENAL CODE SECTION 1214, AND WELFARE AND INSTITUTIONS CODE SECTION 730.6(i) AND (r), AND FUNCTIONS AS AN ABSTRACT OF JUDGMENT.

CR-110/JV-790 [Rev.January 1, 2005]

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

Page 2 of 2

# D. [§83.85] Judicial Council Form: Defendant's Statement of Assets

NAME OF VICTIM ON WHOSE BEHALF RESTITUTION IS ORDERED:	FOR COURT USE ONLY
NAME OF COURT:	
STREET ADDRESS:	
MAILING ADDRESS:	
CITY AND ZIP CODE:	
BRANCH NAME:	
PEOPLE OF THE STATE OF CALIFORNIA	
VS.	
DEFENDANT:	
DEFENDANT'S STATEMENT OF ASSETS	CASE NUMBER:
It is a misdemeanor to make any willful misstatement of material fact in completing this form (I	Pen. Code, § 1202.4(f)(4)).

(Attach additional sheets if the space provided below for any item is not sufficient.)

#### PERSONAL INFORMATION

- 1. a. Name:
  - b, AKA:
  - c. Date of birth:
  - d. Social security number:
  - e. Marital status:

- f. Driver license number: State of issuance:
- g. Home address:
- h. Home telephone no.:
- . Employer's telephone no.:

#### **EMPLOYMENT**

- What are your sources of income and occupation? (Provide job title and name of division or office in which you work.)
- a. Name and address of your business or employer (include address of your payroll or human resources department, if different):
  - b. If not employed, names and addresses of all sources of income (specify):
- 4. How often are you paid (for example, daily, weekly, biweekly, monthly)? (specify):
- 5. What is your gross pay each pay period? \$
- 6. What is your take-home pay each pay period? \$
- If your spouse earns any income, give the name of your spouse, the name and address of the business or employer, job title, and division or office (specify):
- 8. Other sources of income (specify):

#### **CASH, BANK DEPOSITS**

- 9. How much money do you have in cash? \$
- 10. How much other money do you have in banks, savings and loans, credit unions, and other financial institutions either in your own name or jointly (*list*):

	Name and address of financial institution	Account number	Individual or joint	Bal-
a.				ance
				\$
b.				\$
C.				\$

#### **PROPERTY**

11. List all automobiles, other vehicles, and boats owned in your name or jointly:

			Legal owner if different from	<u>Amount</u>
	Make and year	<u>Value</u>	registered owner	owed
a.		\$		\$
b		\$		\$
C.		\$		\$
		(Continued on revers	se)	

	PLE OF THE STATE OF CALIFORNIA vs. NDANT		CASE NUMBER:
12. Lis	st all real estate owned in your name or jointly:		1
	Address of real estate	Fair market v	value Amount owed
;	a.	\$	\$
1	b.	\$	\$
ı		Ψ	Ψ
OTHE	R PERSONAL PROPERTY (Do noted list household	furniture and furnishings	s, appliances, or clothing.)
13. Lis	st anything of value not listed above owned in your nam	e or jointly (continue on atta	ached sheet if necessary):
	<u>Description</u> <u>V</u>	/alue Address w	here property is located
	a. \$		
	b. \$ c. \$		
ASSE	•		
14.	List all other assets, including stocks, bonds, mutual f	funds, and other securities	(specify):
15.	Is anyone holding assets for you? Yes. the name and address of the person or entity holding		he assets and give
16,	Except for attorney fees in this matter and ordinary and routine household expenses, have you disposed of or transferred any assets since your arrest on this matter? Yes. No. If yes, give the name and address of each person or entity who received any asset and describe each asset ( <i>specify</i> ):		
DEBT	·s		
17.	Loans (give details):		
18.	Taxes (give details):		
19.	Support arrearages (attach copies of orders and state	ements):	
20	Credit cards (give creditor's name and address and the	he account number):	
21.	Other debts (specify):		
D-'			
Date:			
	(TYPE OF PRINT NAME)	<b>)</b>	ATURE
	(TYPE OR PRINT NAME)	_ (SIGN	ATURE)
	ated this form to the defendant in the (specify language that he/she understood the contents of the form and he	,	been duly sworn, truly age. The defendant indi-
	(TYPE OR PRINT NAME)	(SIG	NATURE)

# E. [§83.86] Judicial Council Form: Information Regarding Income Deduction Order

SUPERIOR COURT OF CALIFORNIA, COUNTY OF	FOR COURT USE ONLY
STREET ADDRESS:	
MAILING ADDRESS:	
CITY AND ZIP CODE:	
BRANCH NAME:	
PEOPLE OF THE STATE OF CALIFORNIA	
V.	
DEFENDANT:	
INFORMATION REGARDING INCOME DEDUCTION ORDER (Pen. Code, § 1202.42)	CASE NUMBER:
	I

 The court has found that you have the ability to pay restitution and has ordered you to pay restitution in the amount of

a.	\$ pius	percent interest from the date of the order and fees of \$ tims	to all vic-
b.	as listed in the	probation report, dated (specify):	
c.	listed in the se	ntencing minute order, dated (specify):	

Payment must be made as ordered at the hearing.

- The court has entered an income deduction order for your employer to deduct: \$ from your pay each pay period.
  - a. The order applies to current and subsequent employers and all periods of employment.
  - b. A copy of the income deduction order will be served on each of your employers and payers.
  - c. Enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount owed or a showing of good cause for nonpayment.
  - d. You are required to notify the Clerk of the Court *within 7 days* of a change in your address, a change in any of your employers, or a change in the address in any of your employers.
  - e. This income deduction order will be enforced under Penal Code section 1202.42(b) only if you fail to pay the restitution as ordered at the hearing.
  - f. Upon receipt of notice that you have failed to pay the restitution ordered at the hearing:
    - (1) The court or its agent will request that you provide evidence that timely payments have been made or provide information establishing good cause for the failure. If you fail to provide the evidence or fail to establish good cause within 5 days of the request, you will receive notice that the order will be enforced, and the court will serve the income deduction order on each of your employers.
    - (2) Within 15 days of being informed that the stay will be lifted, you may apply for a hearing to contest enforcement of the income deduction order on the ground of mistake of fact regarding the amount of restitution owed or on the ground that you have good cause for the nonpayment. Upon the timely request for a hearing, the income deduction order will not be enforced until the hearing is held and a determination is made on whether the enforcement of the income deduction order is proper.

### F. [§83.87] Judicial Council Form: Order for Income Deduction

SUPER	OR COURT OF CALIFORNIA, COUNTY OF	FOR COURT USE ONLY
STRE	ET ADDRESS:	
MAILII	NG ADDRESS:	
	ND ZIP CODE:	
	ANCH NAME:	
PEOPL	.E OF THE STATE OF CALIFORNIA v.	
DEFEN	IDANT:	
	ORDER FOR INCOME DEDUCTION (Pen. Code, § 1202.42)	CASE NUMBER:
To:	Employer:	
	Address:	
	Add Coo.	
	Phone:	
1.	The court has found that the defendant has the ability to pay restitution under and has ordered that he or she pay restitution of \$ plus 10% inter	
2.	You are ordered to withhold a portion of the earnings of the defendant in this ac (last 4 digits of social security number <i>(specify)</i> : ), each pay	
3.	You are ordered to deduct: \$ from the above named employ forward funds to the	yee's pay each period and
	Clerk of the above entitled court Other (specify):	
4.	This order will terminate upon payment in full or further order of this court.	
	Date:	
SEA	CLERK'S CERTIFICATE  AL The foregoing is a	full, true, and correct
		al on file in this office.
	CLERK OF THE S	UPERIOR COURT
	Date: By	, Deputy
F	orm Approved for Optional Use ORDER FOR INCOME DEDUCTION	Page 1 of 2 Penal Code, § 1202.42

PEOPLE OF THE STATE OF CALIFORNIA v.	CASE NUMBER:
DEFENDANT	

#### Notice to Employer re: Order for Income Deduction (Pen. Code, § 1202.42)

- You are required to deduct the amount specified in the Order for Income Deduction from the employee's income and to pay that amount to the clerk of the above entitled court or its agent.
- 2. The order is to be implemented no later than the first payment date that occurs more than 14 days after the date of service of the order.
- 3. Within two days after each payment date, forward the amount deducted and a statement about whether the amount totally or partially satisfies the periodic amount specified in the income deduction order.
- 4. If you fail to deduct the proper amount from the employee's income, you are liable for the amount you should have deducted, plus costs, interest, and reasonable attorney fees.
- 5. You may collect up to five dollars (\$5) against the employee's income to reimburse you for administrative costs for the first deduction and up to one dollar (\$1) for each deduction thereafter.
- 6. This order and notice are binding until further notice by the court or until you no longer provide income to the employee.
- 7. When you no longer provide income to the employee, you must notify the clerk of the above entitled court and provide the employee's last known address and the name and address of the employee's new employer, if known. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation or five hundred dollars (\$500) for any subsequent violation.
- 8. You must not discharge, refuse to employ, or take disciplinary action against the employee because of an income deduction order. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation or five hundred dollars (\$500) for any subsequent violation.
- 9. If you receive income deduction orders for two or more employees sent by the same court, you may combine the amounts that are to be paid in a single payment, but you must identify the portion of the payment that is attributable to each employee.
- If you receive two or more income deduction orders against the same employee, you must contact the above entitled court for further instructions.

Page 2 of 2

### G. [§83.88] Sample Written Form: Order to Probation Department in Regard to Collection of Restitution

### SUPERIOR COURT OF CALIFORNIA

COUN	ΓY OF
THE PEOPLE OF THE STATE OF CALIFORNIA,	
	Case No
Plaintiff	ORDER TO THE PROBATION
vs	DEPARTMENT IN REGARD TO COLLECTION OF RESTITUTION PAYMENTS
, Defendant	
TO: Co	unty Probation Department
THE COURT ORDERS:	
restitution payments as ordered, Defendant to provide evidence in made or provide information estal fendant fails to provide the Probails to establish good cause with Department will immediately information Deduction Order will be Department will inform the Clerk Deduction Order must be server following a 15-day period, because	has not made his or her monthly victime. The Probation Department will request dicating that timely payments have been blishing good cause for the failure. If Department Department with the evidence or in five days of the request, the Probation of the Court in writing that the Stay of lifted. At the same time the Probation of the Court in writing that the Income dipursuant to Penal Code §1202.42(f) see the Defendant has failed to make respect to the probation of the Court in writing that the Income dipursuant to Penal Code §1202.42(f) see the Defendant may apply for a hearing to the probation of the Court in writing that the Income dipursuant to Penal Code §1202.42(f) see the Defendant may apply for a hearing to the probation of the Court in writing that the Income dipursuant to Penal Code §1202.42(f) see the Defendant may apply for a hearing to the probation of the Court in writing that the Income dipursuant to Penal Code §1202.42(f) see the Defendant may apply for a hearing to the Probation of the Court in writing that the Income dipursuant to Penal Code §1202.42(f) see the Defendant may apply for a hearing to
	Judge of the Superior Court

### H. [§83.89] CDC Victim Services and Restitution Collection Request Form

STATE OF CALIFORNIA REQUEST FOR VICTIM SERVICES RESTITUTION COLLECTION CDC 1707 (Rev 09/03)

DEPARTMENT OF CORRECTIONS

CALIFORNIA DEPARTMENT OF CORRECTIONS (CDC)

OFFICE OF VICTIM SERVICES AND RESTITUTION
Fax Number: (916) 358-2199 Toll Free Number: (888) 562-5874
www.corr.ca.gov/VictimServices
It is your right to be notified of the status of an offender, including: scheduled release date from state prison, scheduled life parole hearing, escape, or death. No notice will be given when an inmate is moved from one facility to another.
PLEASE SUBMIT THIS FORM AFTER THE OFFENDER IS SENTENCED TO STATE PRISON.
I am requesting notification of release regarding an offender and applying for special conditions of parole.
I am requesting notification of release, applying for special conditions of parole, AND collection of restitution.
☐ I am requesting ONLY assistance with collection of Court Ordered restitution.
A. INMATE INFORMATION
Inmate's Full Name: Date of Birth:
CDC Number (Prison Number): Date Sentenced to State Prison:
Court Case Number: County of Commitment:
B. CURRENT ADDRESS
I understand that it is <u>MY</u> responsibility to keep CDC updated regarding my current address and phone number so that notification can be made. Request for notification will be forwarded to the appropriate institution for confidential processing and will not be made available to the inmate or the inmate's attorney.
Applicant's Name:
Address: (STREET) (CITY) (STATE) (ZIP CODE)
Mailing Address (If different):  (STREET or P.O. BOX) (CITY) (STATE) (ZIP CODE)
(STREET or P.O. BOX) (CITY) (STATE) (ZIP CODE)  Telephone Number (Day) ()
C. REQUEST FOR SPECIAL CONDITIONS OF PAROLE
Note: The Parole Authority considers all requests for special conditions of parole at the time of the inmate's release. Not all requests for special conditions are granted.
I am:
☐ Victim, (direct victim of offender) ☐ Family member of victim Relationship:
☐ Parent/Guardian of victim, ☐ Witness, ☐ Concerned citizen
I would like to request the following special conditions of parole:  No contact with victim Parole offender to another country Parole offender 35 miles from victim's (also applies while incarcerated) residence address (cannot be a P.O. Box)  If you would like to provide additional information explaining your request, please attach a separate sheet of paper.
D. REQUEST FOR DIRECT ORDER OF RESTITUTION COLLECTION
Please collect on a Direct Order of Restitution payable to (print name or business specified in the Court Order, and title if requesting for a business):  Amount:
Note: If you are in possession of the Court Order, attaching a copy to this form may accelerate this process.
E. SIGNATURE OF APPLICANT

### V. [§83.90] VICTIM RESTITUTION FLOWCHART

#### **VICTIM RESTITUTION**

When a defendant is convicted of a crime involving a victim and a claim for restitution is made by the victim or California Victim Compensation and Government Claims Board, full restitution must be ordered unless compelling and extraordinary reasons exist *and* are stated on the record. See §§83.36, 83.43, 83.56.

Restitution loss information, if known, is provided to the court for consideration by probation report, prosecutor, or victim impact statement. See §§83.38,

Court advises defendant of Defendant requests Defendant does not the amount being claimed and a hearing. See request a hearing. considered by the court, or if the §83.38. amount is not known, that the restitution amount will be determined at a later date (see Schedule restitu-Order restitution. §§83.39,§83.58); tion hearing. See (Inability to pay has > his/her right to dispute the §83.38. (Hearing no bearing on the amount and/or manner of restitumay be scheduled making of a restitution tion (see §83.39); and after sentencing. In order. See §83.42.) his/her burden of proving that such cases, seek the restitution amount is unreawaiver of defensonable or inaccurate (see dant's presence at 202 /11 hearing. See §83.58.)

#### THE HEARING

- Does not require the formalities of a trial. See §83.40.
- ➤ Defendant has no right to a jury trial. See §83.40.
- Court may consider recommendations in presentence report despite their hearsay character. See §83.40.
- Defendant has the burden of showing that the restitution recommendation or victim's estimates are inaccurate. See §83.41.

Review the evidence/ testimony presented to the court Defendant preand determine the amount of sents evidence losses attributable to the and/or witcrime. **nesses** refuting amount claimed. Order restitution as appropriate based on evi-Defendant *has* dence/testimony presented no evidence or to the court. (Inability to pay witnesses to has no bearing on the making present. of a restitution order. See §83.42.) 83-66

# VI. [§83.91] INFORMATION ABOUT THE CALIFORNIA VICTIM COMPENSATION PROGRAM

#### **Authority**

Under California law (Govt C §§13950–13966), qualified victims of crime may receive financial assistance from the California Victim Compensation Program (Program) for losses resulting from a crime when these losses cannot be reimbursed by other sources. The California Victim Compensation and Government Claims Board (Board) administers the Program.

#### **Losses That May Be Covered**

- Medical/Dental
- Mental Health Counseling
- Wage/Income
- Financial Support
- · Funeral/Burial
- Job Retraining
- Relocation
- Residential Security
- Retrofitting of Residence and/or Vehicle
- Crime Scene Cleanup

#### **Losses That Are Not Covered**

Personal property losses, including cash, are not eligible for reimbursement under the Program. The Program also cannot reimburse applicants for expenses related to the prosecution of an alleged perpetrator or compensate applicants for "pain and suffering."

Losses not covered by the Program, however, may be recoverable either through court-ordered restitution as a part of a convicted perpetrator's criminal sentence or through the enforcement of a judgment obtained in a civil lawsuit against the alleged perpetrator.

#### Who Is Eligible?

- A victim who was injured or died as a result of a crime.
- A derivative victim who was not directly injured or killed as a result of a crime but who, at the time of the crime,
  - was the parent, grandparent, sibling, spouse, child or grandchild of the victim; or

- was living in the household of the victim; or
- had lived with the victim for at least two years in a relationship similar to a parent, grandparent, sibling, spouse, child, or grandchild of the victim; or
- was another family member of the victim, including, but not limited to, the victim's fiancé or fiancée and witnessed the crime; or
- was not the primary caretaker of a minor victim, but is now the primary caretaker.

In addition, when a victim dies as a result of a crime, the Program may reimburse any individual who voluntarily, and without anticipation of personal gain, pays or assumes the obligation to pay medical, crime scene cleanup, and/or funeral/burial expenses.

#### Who Is Not Eligible?

- Persons who commit the crime.
- Persons who contribute to or take part in the events leading to the crime.
- Persons who failed to reasonably cooperate with law enforcement in the apprehension and conviction of the criminal committing the crime.
- Persons who do not cooperate with the staff of the Board and/or the Victim/Witness Assistance Center in the verification of the claim.

Additionally, no person who is convicted of a felony may be compensated for any losses incurred during probation, parole, or incarceration. Once that person has been discharged from probation or has been released from a correctional institution and has been discharged from parole, any crime-related losses that were not incurred during probation, parole, or incarceration may be considered for compensation.

#### These Requirements Must Be Met

Except as provided in Govt C §13956, a person shall be eligible for compensation when all the following requirements are met:

- The person for whom compensation is being sought is a victim, derivative victim, or a person who is entitled to reimbursement for funeral, burial, or crime scene cleanup expenses.
- Either

- the crime occurred within the State of California, whether or not the victim was a resident of California during the time period that the Board determines that federal funds are available, or
- whether or not the crime occurred in California, the victim was a resident of California, a member of the military stationed in California, or a family member living with a member of the military stationed in California.
- If compensation is being sought for a derivative victim regardless of whether they are a resident of California or not, they must meet the definition of derivative victim.
- The victim or derivative victim must reasonably cooperate with law enforcement in the apprehension and conviction of the criminal committing the crime.
- The victim or the applicant, if other than the victim, must cooperate with the staff of the Board and/or the Victim/Witness Assistance Center in the verification of the claim.
- All other sources of reimbursement must be used first.

### **Felony Convictions**

The law prohibits Program-reimbursable expenses incurred by a victim or derivative victim who was also convicted of a felony on or after January 1, 1989, if those expenses were incurred during probation, parole, or incarceration.

#### Filing Deadlines

An application for compensation must be filed within one year of the date of the crime, one year after the victim attains 18 years of age, or within one year of the time the victim or derivative victim knew or in the exercise of ordinary diligence could have discovered that an injury or death had been sustained as a direct result of crime, whichever is later.

The board may for good cause grant an extension of these time periods. The factors to be considered in finding good cause are set forth in Govt C§13953(b).

#### Filing Assistance

Victim/Witness Assistance Centers are located throughout the state. These centers have staff who are trained to help victims apply for compensation under the Program.

Applicants may also be helped by a private attorney. Government Code §13957.7(g) provides that the Board shall pay private attorneys' fees

of 10 percent of the approved award up to a maximum of \$500. The attorneys' fees are not deducted from the applicant's award and are paid separately from the approved award. The law also prohibits attorneys from charging, demanding, receiving, or collecting any amount for their services except as may be awarded by the Board.

#### **Emergency Awards**

If the victim has an urgent unreimbursed loss of wages or income, emergency medical treatment expenses, funeral/burial expenses, crime scene cleanup expenses, and/or relocation expenses as a direct result of a crime, he or she may be eligible for an emergency award. The amount of an emergency award depends on the immediate needs of the victim or derivative victim subject to the rates and limitations established by the Board

Applications for emergency awards are processed within 30 calendar days after the application is accepted as complete.

If the victim receives an emergency award but is later found ineligible to receive any part of it, he or she must repay the amount received in error.

#### Verification and Hearing on the Application

Applications filed with the Program are reviewed to determine eligibility. After completion of this review, the victim will be advised by mail of what recommendation the staff made to the Board on the application. If the victim disagrees with the staff recommendation, appeal rights will also be provided.

An applicant for an emergency award is not entitled to a hearing to contest the denial of the emergency award. Denial of an emergency award, however, shall not prevent further consideration of an application for a regular award and does not affect the applicant's right to a hearing if the staff recommends a denial of a regular award.

#### **Program Pays Last**

The Victim Compensation Program is the "payer of last resort." If the victim has any other sources of reimbursement available for crime-related losses, he or she must use these available sources before becoming eligible for payments from the Program. If the victim receives other reimbursements after obtaining benefits from the program, he or she must repay the Program. Other reimbursement sources the victim may have available include, but are not limited to, medical, dental, or auto insurance, public program benefits, workers' compensation benefits, court-ordered restitution, or civil lawsuit recovery.

By using all other sources of reimbursement, the victim enables the Program to help other deserving victims who have no other source of reimbursement for their losses.

If the victim fails to disclose available sources of reimbursement, the claim may be denied by the Board for lack of cooperation. If this happens, the victim may have to repay any amount the Program has already paid to the victim or on his or her behalf.

#### **General Payment Limitations**

The total of all reimbursements to a victim cannot exceed the maximum Program benefit of \$70,000.

There are also several specific payment limitations governing particular benefits under the Program for loss of wages or income, loss of support, medical expenses, outpatient mental health counseling expenses, residential security expenses, relocation expenses, residential and/or vehicle retrofitting expenses, and funeral/burial expenses.

An applicant who has incurred expenses that exceed the Program's rates/limitations may not be eligible for reimbursement beyond the Program's maximum benefit levels.

State law requires a provider who accepts the Program's payment to consider it as payment in full and prohibits the provider from taking further payment from the person who received the services. This limitation does not apply to reimbursement of funeral/burial expenses.

An applicant's eligibility for Program benefits does not guarantee payment for services rendered.

# VII. [§83.92] INFORMATION ABOUT THE CALIFORNIA DEPARTMENT OF CORRECTION'S RESTITUTION COLLECTION PROGRAM

The California Department of Corrections (CDC) has authority to collect restitution fines and restitution orders from both adults and juveniles housed in an adult institution. Pen C §2085.5.

The CDC is currently deducting 40 percent from prison wages and/or trust account deposits according to 15 Cal Code Regs §3097.

Victims must request the CDC to collect restitution orders on their behalf. Pen C §2085.5(b). Forms are available at any local Victim/Witness Assistance Center, The CDC's Web site (www.corr.ca.gov/victimservices), the CDC's Office of Victim Services and Restitution, and from probation offices.

When a prisoner has both a restitution fine and a restitution order from the sentencing court, the CDC shall collect the restitution order first under Pen C §2085.5(b). Pen C §2085.5(g).

No parolee or inmate may reside in another state unless all restitution orders have been paid in full. Pen C §11177.2.

Restitution obligations shall be considered when recommending a parolee for early discharge or when conducting an annual review. 15 Cal Code Regs §3501.

## **Table of Statutes**

### **CALIFORNIA**

	13950–3966
CALIFORNIA	83.91
CONSTITUTION	13950-3969.7
Article I	83.46, 83.61
15	13951(c)
83.19	83.43
28(b)	13951(g)
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	13953(b)
BUSINESS AND	83.91
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12015.5	83.43
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